Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1290

THE ADHESIVES AND SEALANT COUNCIL, INC.
THE ADHESIVES MANUFACTURERS ASSOCIATION
NATIONAL CONFECTIONERS TRAFFIC CONFERENCE
NATIONAL PAINT AND COATINGS ASSOCIATION, INC.
NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.
HERSHEY FOODS CORPORATION,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, The Adhesives and Sealant Council, Inc., *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on December 17, 1976.

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OPINION AND DECISION BELOW

The Judgment and Memorandum opinion of the Court of Appeals are not reported and are attached as Appendix A hereto. The Report and Order of the Interstate Commerce Commission are reported at 121 M.C.C. 588 and are attached as Appendix B hereto.

JURISDICTION

The Judgment of the Court of Appeals was made and entered on December 17, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 2350.

QUESTIONS PRESENTED

Whether motor common carriers, who are required by certificates issued under the Interstate Commerce Act to provide adequate transportation for all commodities, may elect not to handle commodities subject to freezing or to damage from extreme heat.

Whether the Court was correct in holding that the shippers are not entitled to judicial review of a statutory construction made by the Commission in a rulemaking case but can only do so after filing and processing a subsequent complaint proceeding.

STATUTORY PROVISIONS INVOLVED

Interstate Commerce Act

§ 208(a) [49 U.S.C. § 308(a)]

(a) Any certificate issued under section 306 or 307 of this title shall specify the service to be

rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 304(a)(1) and (6) of this title: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

§ 216(b) [49 U.S.C. § 316(b)]

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and

delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

STATEMENT OF THE CASE

In September of 1971, Travenol Laboratories, a manufacturer of pharmaceuticals, filed a petition asking the Interstate Commerce Commission to investigate the practices of certificated motor carriers of general commodities so as to define their obligation to transport commodities which require some protection against freezing or extreme heat. Travenol's primary concern was the growing refusal of the carriers to transport intravenous solutions during the winter months. Such solutions are composed primarily of water and are in glass bottles. As such, they are subject to freezing if the shipping temperature is allowed to reach a normal freezing level in transit. Travenol's position was that the carriers are obligated by their certificates and the statutory law to transport all commodities covered by such certificates.

The Commission published notice of Travenol's petition in the Federal Register and asked for comments from the public and from carriers. Thereafter, the Commission issued a Notice of Proposed Rulemaking and Order on May 23, 1972, Docket No. MC-C-7599, initiating the administrative proceeding here involved.

Representations were filed in that proceeding by shipper interests, including these Petitioners, representing a broad range of commodities subject to freezing or heat damage from the normal range of temperatures prevalent throughout this country, unless the carriers supply insulated trailers or some other form of protection against extreme temperatures. The

shippers' representations indicated that they experience substantial difficulty in obtaining suitable amounts of temperature control trailer equipment; and the motor carriers of general commodities took the position that they are not obligated to provide protection against freezing or extreme heat (App. B, p. A-9).

The record made before the Commission illustrated the broad spectrum of commodities which are subject to freezing or heat damage unless afforded appropriate protection in transit. Petitioner Adhesives and Sealant Council's members' products require protective service from freezing and consequent damage in transit. A shipper of soaps and shampoos has been forced to use air freight, with 100 percent higher freight costs, because of unavailability of protective service against freezing from motor carriers. An association of food chain stores stated that its members had not been able to obtain needed protective service against heat and freezing from motor carriers. A paint manufacturer of water-based paints showed that unless they are protected from freezing in transit during the winter months the paints freeze and become worthless. Other affected commodities requiring protection from freezing or extreme heat include: citrus fruits, margarine, certain chemicals, pharmaceuticals, plastics, *etc.* Because of problems in obtaining protection from the carriers, shippers have been forced to provide private carriage; and pharmaceutical companies have had to advise hospitals to stockpile vital products in amounts sufficient to see them through the winter (App. B, pgs. A-15 *et seq.*)

On their part, the carriers contended that general commodities carriers, to the extent of their abilities, are providing reasonably adequate service on these commodities; and they urged that the criteria announced by the Commission in *Mid-Western Motor Freight Tariff Bureau, Inc. v. Eicholz*, 4 M.C.C. 755 in 1938, are proper today and

should govern the interpretation of the carriers' statutory duty to provide protection against extreme heat and freezing. In *Eicholz,* the Commission had ruled that, because of equipment limitations, motor carriers do not have available at all times and places trailers equipped to transport perishables; that tariff rules could be published requiring shippers to first ascertain the availability of an equipped vehicle from the carrier before tendering the shipment; and if such equipment is available the carrier must transport the shipment.

The Commission made its decision in the instant proceeding on April 17, 1975, as *Travenol Laboratories, Inc., Petition for Invest.,* 121 M.C.C. 588 (App. B hereto). Notwithstanding the extensive criticisms from the shippers and the service problems disclosed of record by a survey made by its own Bureau of Enforcement[1], the Commission concluded that the protective services provided by all motor carriers if considered collectively, are generally adequate. That broad conclusion of fact, though highly questionable, was not brought into issue before the Court of Appeals. Nor is it in issue. What is in issue is the Commission's new statutory interpretation of the carriers' obligation to transport commodities concededly embraced in their certificate.

As for that statutory issue, the Commission first correctly framed the issue:

> The issue is whether a carrier subject to part II of the act can be required by this Commission to provide the full service specified in its certificate. (App. B, p. A-28)

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[1]The Bureau's study showed one-third of the shippers "had problems" obtaining protective service (App. B, p. A-31).

It then noted the statutory mandate to certificated carriers:

> the provisions of section 216(b) require every motor common carrier "***to provide safe and adequate service, equipment and facilities***". Section 208(a) also provides that this Commission *shall* "***at the time of issuance and from time to time thereafter,***" attach such conditions and limitations to the exercise of operating authority granted to a motor carrier pursuant to the provisions of part II of the act. (App. B, p. A-28)

After discussing the *Eicholz* case, the Commission noted that this proceeding raises questions unanswered in that case:

> The matter now before us, however, raises two additional questions: (1) whether a motor common carrier authorized to transport general commodities is or can be required to maintain at least some protective equipment; and, if not (2) whether at any given time, when equipment suitable for the transportation of a given commodity is not available, either by carrier design or otherwise, the duty to serve is thereby lessened and properly may be reflected by appropriate tariff provisions. (App. B, p. A-32)

Answering those questions, the Commission thus reached the following conclusions which are the focus of this review proceeding:

> Based on the record in this proceeding we cannot conclude that it is unreasonable or inconsistent with the public interest for general-commodity carriers to elect not to acquire and maintain temperature-control equipment. Accordingly, we believe that it is lawful for them to decline to provide transportation when they are

> tendered commodities which they cannot transport safely at that time without such equipment. (App. B, p. A-33)

Thus, the Commission concluded that certificated carriers, which are required by statute to provide adequate transportation service for all the commodities authorized in their certificates, are not really required to handle all commodities but may completely exclude from their service any commodities requiring protection from extreme temperatures.

Petititions for reconsideration were filed by shipper interests, including these petitioners, and were denied by the Commission's Order of September 29, 1975, thereby exhausting the available administrative remedies. A petition for review was then filed with the Court of Appeals which took jurisdiction under 28 U.S.C. §§2321 and 2342. That court entered its Judgment and Memorandum opinion on December 17, 1976, affirming the Commission's decision and orders.

ARGUMENT

1. This Case Involves a Serious Error of Statutory Construction with a Pervasively Adverse Effect on Shippers and Consumers.

The Interestate Commerce Act provides a balanced statutory scheme whereby, on the one hand, motor transportation is placed in the exclusive hands of certificated carriers, and, on the other, those carriers are given the corresponding obligation to provide service for all the commodities covered by their respective certificates. Thus, 49 U.S.C. §308(a) provides that the certificate shall specify the commodities and routes (*i.e.*, "service") authorized to each

carrier and 49 U.S.C. § 316(b) imposes a "duty" on each carrier "to provide safe and adequate service, equipment, and facilities for the transportation of property" as described in the certificate.

In the past, the Commission, the carriers, and the shippers have been aware that the commodity and route descriptions in each certificate bear with them a concomitant duty to provide that same service. It was well settled that a certificate for the transportation of "general commodities" imposed a duty to handle all commodities; and that particular commodities could not be shunned. *National Furniture Traffic Conf. v. Assoc. Truck Line*, 332 I.C.C. 802, aff'd *Assoc. Truck Lines v. U.S.*, 304 F. Supp. 1094 (W.D. Mich., 1969), *Restrictions on Service by Motor Common Carriers*, 111 M.C.C. 151, 167 (1970).

Of course, there has been a practical limitation of the limits of a carrier's *ability* to serve, such as in *Eicholz* where the Commission authorized a procedure whereby the shipper would first ascertain the immediate availability of protective equipment from a particular carrier before tendering a shipment requiring protection from extreme elements. But here, for the first time, the Commission has misinterpreted the statute as allowing an *election* on the part of each carrier as to whether it will transport any of these commodities at all. The Commission has thus ruled that the carrier can relieve itself from its statutory *duty* by a simple self-dispensation whereby it would proclaim that it no longer will handle any such freight.

It strains beyond the bounds of reasonable statutory construction thus to hold that Congress has created a monstrosity whereby the shippers of this country are limited by law to shipping only via a certificated carrier but that the certificated carrier is vested with the right to elect not to handle an important part of the freight requiring

transportation. The Commission's decision, affirmed by the Court of Appeals, does violence to the statute and must be corrected to avert a void in transportation in this country. Whereas Travenol had asked the Commission to toss it a lifeline to aid in its efforts to obtain transportation of life-support commodities during the winter months, the Commission has instead provided an anchor. And, by converting what had been recognized as a duty into an election, it has seriously impaired the ability of other shippers to obtain service during the winter and summer months.

The importance of this statutory misconstruction is pervasive. From a commodity coverage standpoint, the ruling affects not only critical items such as intravenous solutions, blood, and a broad range of pharmaceuticals whose effectiveness is destroyed if subjected to freezing in transit, but basic items such as foods, margarine, candy, paints, plastics, chemicals, *etc.* Walk through the aisles of any grocery, general store, drug store, *etc.*, and one is surrounded by hundreds of items which are adversely affected by freezing or extreme heat. Is the statutory mandate of adequate equipment and service to be construed as inapplicable to these common everyday items?

From a geographic standpoint, the impact of this ruling on the nation's commerce is also all-inclusive. It would be difficult to locate a section of the country where freezing temperatures are not encountered at some period of the year. And, if one were found, it would be a section where protection from extreme heat is badly needed by many commodities. Moreover, there are many sections of this country where freezing temperatures occur during nine months of the year. It can fairly be said that the statutory interpretation made in this case will have on impact on every person in this country in terms of availability of commodities, their condition at time of use, and the total distribution cost included in the prices charged.

Beyond the direct impact upon the range of commodities affected, this ruling also has broad implications for other commodities generally. Until now, the statutory standard of adequate service and equipment has consistently been interpreted as a duty. If it were allowed to stand as merely a matter of each carrier's election, then that construction could be used to support a whole series of elections as to other commodities which the carriers seek to avoid for various other reasons.

II. The Court Of Appeals' Erred In Holding That Shippers Are Not Entitled To A Judicial Review of The Commission's Construction Of Statutes In A Rulemaking Proceeding

The Court of Appeals declined to pass on Petitioners' contention that it was error for the Commission to hold that motor common carriers with general commodities certificate may "elect not to acquire and maintain temperature-sensitive equipment" (App. A pp. A-3-4) The court held that the statutory construction issue was not ripe for review on the ground that the Commission's ruling would not foreclose a shipper from filing a complaint with the Commission challenging the reasonableness of the service provided by an individual carrier.

This decision conflicts with the principles laid down by this Court in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942); *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956); *United States* v. *Storer Broadcasting Company*, 351 U.S. 192 (1956); and *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

The instant decision of the Commission issued in a rulemaking proceeding designed to define carriers' responsibilities in this area, establishes the principle that a carrier of general commodities is under no duty to acquire and maintain adequate equipment for temperature-sensitive commodities. That ruling now controls the services made (or not made) available by carriers would be controlling in a subsequent proceeding against an individual carrier. The observation in *Columbia, supra,* that:

> . . . the injury can not be avoided, as the Commission suggests, by appellant's intervention in proceedings upon applications for renewal of licenses by its affiliates or in proceedings to cancel their licenses if and when such proceedings are instituted . . . (p. 423)

is equally inapplicable here. The injury cannot be avoided by subsequent institution of proceedings against carriers which take advantage of the authorization granted by the Commission to disable themselves to carry temperature-sensitive commodities by electing not to acquire or maintain temperature-controlled equipment. Also, as noted in *Gardner, supra,* at pages 148-149, the effects of the Commission's order are "felt in a concrete way by the challenging parties" and the Commission's ruling, therefore, is ripe for review. The Court of Appeals was wrong in suggesting that the Commission's ruling in the instant rulemaking proceeding was somehow not binding and that a shipper could only test that ruling by a specific complaint against a particular carrier *in futuro* and not by a review of this proceeding.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

Charles J. McCarthy
Daniel J. Sweeney

Counsel for Petitioners

March 17, 1977

APPENDIX A

NOT TO BE PUBLISHED - SEE LOCAL RULE 8 (f)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2154 September Term, 19 76

The Adhesives and Sealant Council, Inc., et al., Petitioners

v.

Interstate Commerce Commission and
United States of America, Respondents

National Motor Freight Traffic Association, Inc.
Southern Motor Carriers Rate Conference, Inc.
American Trucking Association, Inc.,
Regular Common Carrier Conference of American Trucking Associations, Inc.
Motor Carriers Central Freight Association, Intervenors

PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

Before: BAZELON, Chief Judge, McGOWAN and ROBB, Circuit Judges

J U D G M E N T

This cause came on to be heard on a petition for review of an order of the Interstate Commerce Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the order of the Interstate Commerce Commission on review herein is hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

George A. Fisher
Clerk

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 17 1975

GEORGE A. FISHER
CLERK

MEMORANDUM

In 1972 the Interstate Commerce Commission initiated, by notice of proposed rulemaking, a general investigation into the adequacy of the protective services provided by all modes of surface transportation. A particular concern, however, was with motor common carriers of general commodities, since the Commission had received complaints that carriers of this class had been failing to provide adequate protective service in the case of commodities which required, not continuously but at certain seasons of the year, special protection against extremes of either heat or cold. The provision of such protection requires the availability of special equipment with temperature controls.

The Commission's investigation elicited numerous statements from interested parties, both private and governmental. On the basis of the administrative record in rulemaking so compiled, the Commission made a finding that "the provision of protective services by motor common carriers of property subject to part II of the act is reasonably adequate;" and it, accordingly, discontinued the investigation. 121 M.C.C. 588 (1975).

Petitioners in this proceeding have sought review of this action. In doing so, however, they have explicitly disclaimed to us any purpose to challenge the finding, either as unsupported by the record or for any other reason. They also state that they have no quarrel with the Commission's reaffirmation in the course of its opinion of its so-called *Eicholz* rule *(2 Mid-Western Motor Frt. Tariff Bureau v. Eicholz,* 4 M.C.C. 755 (1938)) to the effect that motor common carriers of general freight may, by the publication of appropriate tariffs, place an obligation on shippers to ascertain the availability of suitable protective equipment before tendering shipments thought to require it—a rule which

certainly appears to contemplate that a motor common carrier may on occasion be privileged to decline to accept shipments requiring special protection. Finally, petitioners assert that they do not make what they characterize as the unreasonable claim that every motor common carrier must be equipped to handle all of the freight seasonally requiring protective service that is tendered.

Given these representations on the part of petitioners, the court found it difficult to know exactly what relief they were seeking in this proceeding. At oral argument counsel for petitioners stated that its problem lay in certain observations in the Commission's opinion which were subject to the construction that no motor common carrier certificated to carry general commodities would, should it elect not to do so, be required to provide any special equipment whatsoever capable of protecting shipments against seasonal extremes of either heat or cold. Petitioners contend that any such policy on the part of the Commission would nullify the common carrier responsibilities envisaged by the general commodity certificates and would, in particular, set a naught the statutory oblibation of motor common carriers "to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce;" 49 U.S.C. § 316(b). In response to the court's questions, counsel purported to be concerned that any complaint proceeding against a particular motor common carrier for failing to furnish adequate service in this respect would be rejected *ad initio* by the Commission by reference to this language in its opinion.

As it intimated in the course of the oral argument, the court conceives that, given the unchallenged aspects of the Commission's action under review, the question of whether a particular common carrier is living up to its obligations under its certificated authority is one that can be meaningfully

explored only by reference to that carrier's individual actions and circumstances. The court does not read the Commission's opinion as meaning that under no circumstances would it entertain for investigation and appropriate action a complaint that a particular common carrier is unreasonably and arbitrarily failing to supply the service required of it by the statute and the terms of its certificated authority. Certainly counsel for the Commission appearing before us declined an invitation to represent that this was the case. The finding by the Commission in its general investigation that the service presently being provided is "reasonably adequate" does not appear to us to foreclose inquiry by the Commission in appropriate circumstances into the alleged deficiencies of a particular carrier.

APPENDIX B

Served May 7, 1976

M-12664

INTERSTATE COMMERCE COMMISSION

No. MC-C-7599

TRAVENOL LABORATORIES, INC., PETITION FOR INVESTIGATION—PROTECTIVE SERVICE

No. MC-C-7599

TRAVENOL LABORATORIES, INC., PETITION FOR INVESTIGATION—PROTECTIVE SERVICE

Decided April 17, 1975

Upon petition, investigation and consideration of views, arguments, and representations of the parties, protective services offered and provided by common carriers by rail and motor found in general to be reasonably adequate. Duties imposed upon motor common carriers of general commodities by the provisions of their certificates and section 216(b) of the Interstate Commerce Act to provide protective services found to be in need of clarification. Adoption of certain interpretations proffered by petitioner concerning the obligation of general-commodity common carriers to provide protective service found not justified on the present record. Petition denied and proceeding discontinued.

S. R. Brittingham, Jr., L. C. Cypert, William C. Harris, William J. Monheim, Roger M. Shaner, Lawrence T. Sheils, F. J. Steinbrecher, and *Douglas C. Wynn* for motor carriers.

Peter T. Beardsley, R. Edwin Brady, Drew L. Carraway, Nelson J. Cooney, Rex Eames, John S. Fessenden, Jon F. Hollengreen, Brenda P. Murray, Dabney T. Waring, Jr., James E. Wilson, and *F. L. Wyche* for motor carrier associations.

Charles W. Burkett, Jr., James I. Collier, Jr., and *Howard E. Roos* for railroad interests.

Robert E. Born, Francis P. Desmond, Michael Gallagher, Robert G. Gawley, William Kenworthy, Thomas M. Knebel, F. Houston Lynch, Jr., J. Michael May, John W. McFadden, Jr., George D. Michalson, Norman Powell, Bryce Rea, Jr., J. A. Royal, and *John Wormack* for tariff associations.

Eugene D. Anderson, Thomas G. Baranski, John M. Cleary, Richard B. Cortland, Leslie M. Cox, John F. Donelan, Thomas C. Dorsey, J. A. Dupont, Vincent B. Emanuele, W. F. Geach, James F. Hickcox, William Q. Keenan, Ronald K. Kolins, C. R. Looney, Dickson R. Loos, W. L. McCracken, Clarke J. Munn, Allen W. Pinkerton, Barry Roberts, Gerald R. Russell, and *K. J. Whelan* for shippers' interests.

John E. Curley and *Bernard A. Gould* for the Bureau of Enforcement, Interstate Commerce Commission.

Harold M. Carter, Paul L. Mills, Kenneth H. Vail, and *Ronald P. Vail* for Commodity Credit Corporation, United States Department of Agriculture.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Many of the commodities relied upon by the citizens of this Nation for survival require during their transportation special protection from the climate. As an example, certain medical supplies being transported to hospitals require both expedition and protection against freezing because if such supplies freeze, they no longer can accomplish the lifesaving function for which they were manufactured. Americans also depend on surface transportation to transport foods to local retail stores. Many foods move under refrigeration; others must be protected from the cold. The question confronting this Commission at this time is whether carriers subject to our regulatory jurisdiction are providing adequate and reliable protective services required in the interstate movement of these and other commodities. If not, the questions are what can and should be done about it.

BACKGROUND

By petition filed September 20, 1971, Travenol Laboratories, Inc., of Deerfield, Ill., sought the institution of this proceeding for the purpose of investigating the practices of motor common carriers with respect to the provision by such carriers of protective services. In particular, the petitioner seeks to have answered the question of whether protective service[1] is a required duty of a motor common carrier authorized by this Commission to transport general commodities.

Travenol is a producer of pharmaceutical supplies (including intravenous solutions), most of which are packaged in glass. It asserts that general-commodity carriers have historically handled such products both in the summer and winter months, the latter service being provided to the best of the carriers' ability at no additonal charge. Petitioner contends that each year more and more carriers are refusing to handle these products during the winter months; and that these refusals are based on the claim, among other

[1] Although petitioner eliminated refrigerated service from the scope of its request, such services have been included within the ambit of the present investigation.

things, (a) that the carriers do not have the equipment available; (b) that they handle single-line traffic only; (c) that they will not accept shipments subject to freezing on Thursday or Friday; or (d) that they simply do not desire the business.

Travenol maintains that unofficial embargoes have been placed on commodities that are susceptible to freezing. It asserts specifically that carriers in the Detroit, Mich., area embargoed such items between December 19, 1969, and January 5, 1970, and that acceptance of such traffic was continued only on an erratic basis through January 1970. Petitioner further argues that in many parts of the country it is required to remove its request for protective service from a bill of lading and ship at its own risk in order to have urgently needed medical supplies moved during cold weather periods.

In support of its petition, Travenol submits as exhibits (1) the National Classification Board's "Proposal For Change In The National Motor Freight Classification" form, containing question 7 -(p) which reads: "Does commodity require heat————————, refrigeration————————?"; (2) correspondence with the Michigan Public Service Commission allegedly reflecting futile attempts to obtain protective service within Michigan; (3) an Eastern Central Motor Carrier Association docket, assertedly indicating that protective service will not be provided unless the carrier agrees to render such service;[2] (4) several bills of lading demonstrating the shipper's risk in shipping commodities subject to freezing; and (5) a letter from a carrier demonstrating difficulties in obtaining protective service.

In conclusion, petitioner avers that motor common carriers' willingness to transport the involved type of commodities during the summer months and their refusal to handle the same commodities during the winter months, under the same certificate of public convenience and necessity, is a violation of the principles established in Ex Parte No. MC-77, *Restrictions on Service by Motor Common Carriers*, 111 M.C.C. 151 (1970).[3] (The *Restrictions* case.)

Notice of the filing of the above-mentioned petition was published in the Federal Register on October 29, 1971, and

[2]Travenol asks that this Commission investigate the practices only, and not the charges, of motor common carriers with respect to providing protective service. It raises the tariff issue only to demonstrate that certain rate conferences assertedly intend to have their member carriers furnish protective service only at the carrier's option.

[3]The regulation adopted in Ex Parte No. 77 [49 CFR 1307.27 (k)] was construed in Ex Parte No. 77 (Sub-No. 1), reported at 119 M.C.C. 691 (1974). The effective date of the latter report has been stayed indefinitely pending final disposition of petitions for reconsideration.

interested persons have submitted their views and comments on the matters raised in the petition. Shippers generally agreed with the assertions of Travenol and contended that an investigation proceeding by this Commission is necessary in order to improve the quality of protective services offered by carriers operating under our economic jurisdiction. These shippers complained that there are an increasing number of motor common carriers of general commodities which do not offer protective services; that they lose sales because they cannot obtain protective services from motor carriers; that they will present complete evidence on these matters if an investigation proceeding is instituted; and that they cannot obtain pickup services either on items subject to freezing on Thursday or Friday or on such shipments requiring interline movements.

The petition was opposed by motor carrier interests which contend that protective service is not a required duty of a general-commodity carrier. M-F and Poplarville urged us to reexamine our decision in *Mid-Western Motor Frt. Tariff Bureau, Inc., v. Eichholz*, 4 M.C.C. 755 (1938),[4] in light of our recent decision in the *Restrictions* case, *supra*. These carriers believe that the *Eichholz* rule represents the best solution to the problem because it assertedly provides for an adjustment of equities between carrier and shipper. But these two carriers also urged a complete investigation into the area of protective services if this Commission entertains doubts as to the validity of the *Eichholz* decision. Carrier interests also pointed out that "heater service" can cause damage to other lading and that, in the case of connecting carriers, one may provide protective services while its connecting carrier does not. These problems, which have been spotlighted by the opponents of the involved petition, served in our judgment to emphasize the need for an investigation into this field of service.

After carefully considering the petition and the representations, we issued a Notice of Proposed Rulemaking and Order on May 23, 1972 (see 37 F.R. 11400). It was there concluded that the public interest requires a complete investigation into the responsibilities of all carriers subject to our regulation to provide protective services. We stated that although special attention will necessarily be focused

[4]It was noted in the *Eichholz* case that, because of equipment limitations, motor carriers do not have available at all times and places vehicles equipped to transport perishables. Therefore, it was found that tariff rules concerning protective services should provide that the shippers must ascertain whether properly equipped vehicles are available before tendering a shipment to a particular carrier; and thus if the equipment is so available, the carrier must accept the shipment for transportation.

upon the responsibilities of motor common carriers of general commodities to provide such protective services pursuant to their duties as certificated carriers, an investigation of protective services available to the shipping public would be incomplete without studying the services offered by all carriers subject to our regulatory jurisdiction. The said notice and order (a) named all railroads, express companies, motor carriers, water carriers, brokers, and freight forwarders of perishables, subject to the Interstate Commerce Act respondents in this proceeding, (b) directed the Bureau of Enforcement of this Commission to participate herein, and (c) invited comments from any interested persons. Those persons filing representations in this proceeding are listed in the appendix to this report and will be referred to by their appropriate short titles.

Representations

The representations indicate that shippers on occasion cannot obtain adequate amounts of suitable temperature-control equipment; that motor carriers of general commodities do not feel obligated to provide protective service; and that the major problem herein involves the transportation of smaller shipments requiring temperature control.

Initial Statements

Motor carriers.—Continental, a large motor contract carrier operating in all 48 of the coterminous United States, contends that no useful purpose will be served by including contract carriers in this investigation because such carriers do not serve the general public. It asserts that subjecting contract carriers to general rules which might be adopted in this proceeding would endanger the close working relationship required between such carriers and the shippers they serve.

McAdams, a certificated motor common carrier, operates trailers equipped with mechanical refrigeration. It states that the cooling unit is attached to the trailer and is susceptible to damage, and that in the event of failure of the cooling unit, it is possible to lose by spoilage a complete trailer load of the commodity being transported. It contends that general-commodity carriers, which do not operate mechanically refrigerated equipment, use charcoal or gas heaters placed in the body of the trailer with the freight being

transported; that the flame and fumes cause a problem in the transportation of mixed shipments of general commodities; and that these same carriers frequently require that a refrigerant (such as dry ice) be included in a shipment requiring refrigeration at the expense of the shipper. McAdams maintains that regular-route, general-commodity motor carriers generally restrict their holding out to render protective service to certain seasons or days of the week; and objects to the fact that these nonspecialized carriers often protest McAdams' applications for authority to transport commodities requiring refrigeration and are often successful. It states that many shippers have suffered the penalties of using such regular-route services, while many others have established private carriage operations to assure themselves of the availability of protective services. McAdams notes that the regular-route, general-commodity carriers participating in the National Motor Freight Classification A-12 MF-I.C.C. No. 14, generally do not hold themselves out to render a protective service.

M-F, operating over regular routes, and Poplarville, operating over irregular routes, are both motor common carriers of general commodities which transport, among other commodities, pharmaceutical supplies and intravenous solutions (for petitioner), candy, and chemicals. They assert that general-commodity carriers must perforce transport a large volume of less-than-truckload (LTL) traffic and must, therefore, consider the needs of all their customers, not merely those of a select type; that the provision of heater service for an LTL shipment of pharmaceuticals might damage confectionery being carried in the same trailer; and that most of the freight they handle does not require temperature-controlled trailers. They argue that a general requirement that all carriers provide protective services would result in uneconomical use of such equipment and claims problems on interline and especially intermodal shipments. M-F and Poplarville contend that shippers utilizing such services should bear the costs of these services. They note that this Commission has determined that protection from heat [*Dairy and Packing House Products—Iowa, Nebr.-Chicago*, 51 M.C.C. 77 (1949)] and cold [*Heater Service Charge From Chicago to East*, 61 M.C.C. 473 (1953)] are separate services for which separate rates or charges must be stated in the tariff.

M&N, a motor common carrier operating over irregular routes, specializes in the transportation of foodstuffs. It provides protective services and must do so to continue in business. All of its equipment

is furnished with mechanical temperature-control devices, and protective services are offered every day of the year. M&N believes that specialized carriers such as itself should not be included in this investigation. Colonial and Refrigerated are also specialized motor common carriers offering extensive protective services. Refrigerated offers LTL services on perishable foods and does not believe that refrigerated service should be included in this investigation.

Santa Fe, a motor common carrier engaged in the transportation of general commodities, provides protective service on shipments requiring such service throughout its system. It states that shippers utilize specialized common or contract carriers by motor vehicle, or private carriage, for volume shipments and offer regular-route carriers only that traffic which is inconvenient or uneconomical for the other carriers to handle. It suggests that we enter an order setting standards for packaging of LTL shipments of perishables by shippers in a manner sufficient to withstand damage from extremes of heat or cold during transportation by common carrier.

Motor carrier associations.—ATA takes the fundamental position that a common carrier's duty to transport property is subject to reasonable limitations. It notes that some motor carriers of general commodities have extensive facilities for handling traffic requiring protective services because they transport these commodities on a large scale, while other such carriers do not have refrigerated trailers because their business does not justify them. ATA reports that there are currently in operation approximately 200,000 refrigerated trucks and combinations, plus another 100,000 insulated but not refrigerated trucks and trailers. According to ATA most general-commodity carriers refuse to accept freight when they know they lack equipment or storage facilities to protect it from damaging weather conditions and that in many circumstances, carriers and shippers that work together on a year-round basis will arrange for the traffic to move as soon as practicable after a break in the weather. ATA claims that motor carriers, which lack temperature-controlled vehicles or storage facilities, avoid pickups on Thursday or Fridays because they do not want to have freight in their possession over weekends when deliveries are usually impossible, thus increasing the opportunity for damage to the lading; that carriers often request prior notice where the shipper needs protective service to assure that the type of equipment needed will be available at the appropriate terminal for dispatch to the shipper's facility; that general-commodity carriers widely

circulate their equipment lists and operational bulletins on perishable traffic so that the public will be aware of the service they offer; and that this practice of the carriers is in keeping with their common carrier obligation to furnish service to the limit of their capacity.

ATA states that the cost of a refrigerated trailer runs from $12,000 to $16,000 while the cost of operating refrigerated tractor-trailer unit is estimated at $150 to $175 a day and that as a consequence, a refrigerated trailer is not the most economic way to move general-commodity freight. It represents that shippers have available the services of specialized carriers, including some 89 motor carriers which specialize in providing temperature-control service. ATA, therefore, seeks retention of the *Eichholz* rule. It argues that it is possible that shippers want general-commodity carriers to be required to provide protective service in hopes of obtaining transportation of perishables at rates lower than those of the specialized refrigerated carriers; that the problem described by petitioner refers to those sporadic demands for protective service on commodities not normally requiring such service when extreme weather conditions exist and that such irregular demand for special equipment is not sufficient to show a need for additional service; and that the facts do not warrant a finding by this Commission that all motor common carriers have a duty to provide on call protective service.

HGCB states that its members, motor common carriers of household goods, encounter virtually their only demand for protective service when transporting sensitive electronic equipment. Its members have special charges for such "Climatic Control Service." It contends that while household goods carriers were not intended by petitioner to be subject to this investigation, HGCB studied these matters in a spirit of cooperation, as they pertain to the household goods industry, and discovered that 40 vans were equipped with temperature control out of a total of 10,000 vans operated by the 16 major moving firms. HGCB states that its members handled all traffic requiring such protection service without complaint.

NBTA submits that any conclusions we reach in this proceeding with respect to the provision of protective service should not be applicable to the intercity motorbus industry and that motor common carriers of passengers should be dismissed as respondents to this proceeding. Its members do not and cannot offer protective service on shipments of property.

MCCFA is an association of 42 motor common carriers of general commodities. While petitioner described the practices of many general-commodity carriers during the winter months, this association contends that when temperatures reach levels below 10°F. to 15°F. such protective service may properly be interrupted temporarily because of the unreasonable risk that such low temperatures would impose upon the lading notwithstanding the efforts of the carrier to protect such lading. It submits that the best interests of the public are being protected by the carriers which determine at the time of tender whether or not freezable traffic can be protected against the prevailing elements of weather and with the equipment then available. It explains that this proceeding is concerned mostly with LTL traffic which requires that trailer doors be frequently opened, thus constantly exposing the contents to the weather; and that the use of portable heaters might damage or ignite certain other lading. MCCFA asserts that carriers generally consult with their customers regarding winter services and shippers with such advance notice as to the days of the week that their carrier provides protective service on LTL traffic should have little difficulty in avoiding any emergency or shortages of goods. It is opposed to the adoption by this Commission of any rule which would require all motor common carriers to operate mechanically refrigerated vehicles.

Tariff associations.—NMFTA, et al., represent thousands of motor carriers under an agreement approved by us pursuant to section 5a of the Interstate Commerce Act. These associations contend that no statutory duty exists which requires motor common carriers to provide protective services or which permits this Commission to require such carriers to perform this service. They rely on the *Eichholz* case to support this contention; and they assert that the provisions of part I of the Interstate Commerce Act vesting in this Commission jurisdiction over protective service furnished by the railroads [sections 1(3)(a), 1(14)(b), and 20(6)], are conspicuously absent from part II of the statute, and that such jurisdiction, therefore, does not exist over motor carriers.

Southern argues that any rule that might require that a relatively small portion of the shipping public be accorded a type of service requiring an extensive investment in motor carrier facilities would place an unfair burden upon the general public, and that general commodity carriers then would have to maintain temperature controlled equipment and storage facilities, which would result i

higher shipping costs to the general public. It avers that incompatible temperature-control commodities cannot be transported in the same vehicle, and if separate vehicles are required, the result is wasted equipment space; and that part I of the act requires railroads to provide some protective services, whereas, part II does not require motor carriers to do so. Southern contends that because many commodities require protective service only at certain seasons, any requirement that carriers maintain certain types of equipment would result in unused facilities; and that in the absence of discrimination, this Commission is without power to compel a carrier to furnish any particular type of equipment, citing *United States* v. *Pennsylvania Railroad Co.*, 242 U.S. 208, 221 (1916). Southern requests that we adopt the rule assertedly followed at common law that "a common carrier is not bound to accept for transportation*** a commodity which it knows it cannot safely deliver to destination without damaging it." *R.C.A. Truck Lines, Inc.* v. *Georgia Rug Mill, Inc.*, 88 Ga. App. 658 (1953). Central & Southern elected not to discuss the issues involved in an initial statement.

Shipping interest.—A & SC is an organization of manufacturers of adhesives and sealants and of the products used in the manufacture of adhesives and sealants. These products at times throughout the year require protective service in the form of heat to prevent freezing and damage in transit. A & SC supports the position of the petitioner and contends that common carriers are obligated to accept for transportation all commodities not otherwise restricted by their certificates and to handle and deliver such articles in a safe and undamaged condition. It asserts that restrictions against the acceptance and transportation of commodities requiring protective service, by tariff item, amount to an embargo or failure on the part of the carriers to perform the transportation services authorized by their certificates (citing Ex Parte No. MC-77, *supra*). The Council reports that parcel post and United Parcel Service do not provide protective service, that REA Express will not accept freezable shipments during winter months, that rail carload protective service is virtually curtailed during the winter months; that most motor carriers will provide protective service on volume shipments subject to advance notice and suitable equipment being available; and that protective service on LTL shipments requires 1 to 3 days' notice and proper equipment is less available for such smaller shipments. It notes that many tariffs have provisions limiting protective services, such as "protective service provided, subject to carrier's

estimation of weather conditions," "provided on shipments picked up on certain days of the week," "subject to weight limitations," "limited to local traffic or single-line service," and "limited to specific origins and destinations." A & SC asserts that certain motor carriers like Knox Motor Service offer protective service in one tariff, but eliminate protective service in other tariffs. It avers that motor carriers should distribute public announcements explaining in more detail the conditions under which protective service will be provided. Another problem facing A & SC members involves the attitude of carriers which do not publish restrictions against the furnishing of protective service, but which accept freezable shipments and later deny liability when goods are damaged. It proposes that carriers be allowed to publish rules requiring that bills of lading carrying notations and packages clearly marked in such a manner to indicate that protective service against freezing is required or requested and that the carrier be relieved of liability for damage caused by freezing unless such bills of lading are so noted and packages so marked.

AHSC is a manufacturer of products used in the health-care field. Some of its products which must be protected against freezing are intravenous solutions, chemical reagents, chemical controls, and blood-typing serums. It states that many motor common carriers such as Roadway Express offer no protective service, while others offer protective service on Monday, Tuesday, or Wednesday only; thus this service is further limited by the fact that most carriers refuse to handle freezables when the temperature falls below 10°F.; and that some of its freezables are flamables and cannot be transported in trailers using butane-type heaters which have an open flame. It avers that many carriers will not accept joint-line shipments of freezables, while those shipments which are accepted involve delays at the interchange point because connecting carriers do not have heated trailers. AHSC represents that motor carriers are obligated to provide protective service on its commodities.

Armour-Dial ships meats, soap, and shampoos, among other things, which require protection from freezing. It states that the most significant problem involves the movement of LTL shipments; and that it has turned to airfreight as an alternative, but this increases costs by over 100 percent. It asserts that common carriers are obligated to transport its commodities under all weather conditions. Armour and Company's meat shipments require refrigeration, as well as protection from freezing; and it has found that truckload service is readily available, but that LTL service is

undependable or is provided at prohibitive rates. It states that joint-line service on LTL perishables is virtually unavailable.

Blue Anchor, a farmer cooperative, markets fresh perishable agricultural commodities. Its statement pertains solely to railroad freight transportation. It states that during the period from 1966 to 1971, railroads have lost 42 percent of their California fresh fruit traffic because of poor service and increasing rates; that there is a continuing decline of available refrigerated equipment and an increasing failure properly to maintain present equipment; and that another cause for failing rail service is the withdrawal by the eastern carriers from the "guaranteed" through schedule that took place in June 1964. Blue Anchor avers that continued movements of fresh fruits cannot be economically marketed in the railroads' new larger equipment.

Continental produces fresh bread, cake, candy, and a complete line of frozen foods. It has found refrigerated common carrier service to be adequate. It states that the cost of refrigeration is included in the freight rate.

Land O'Lakes manufactures dairy products which require protective service against both heat and cold. Because rail refrigerated equipment was hard to obtain, it used the ice bunker car, but in 1973, the railroads were permitted to phase out that service. It states that motor carrier service is inadequate on LTL shipments.

MPTA is an association of meat producers. Meat requires protection from both heat and cold, and MPTA contends that its members cannot obtain adequate amounts of suitable rail or motor equipment upon reasonable notice. It asserts that general-commodity carriers usually lack refrigerated equipment while specialized carriers have more authority than their equipment can handle; and that TOFC shipments are often rejected because of delays in transit and TOFC equipment is generally in poor condition. It suggests that this Commission revoke and restrict grants of motor carrier operating authority consistent with the rendering of service. It also proposes the granting of trackage rights to railroads providing refrigerated services so they may avoid problems of diversions, per diem, and the abuse of equipment by the destination line.

NAFC is a trade association representing food chains throughout the Nation. Food chains purchase large quantities of foodstuffs, meats, and frozen foods. NAFC asserts that rail service is deteriorating because the railroads seek to use only a 50-foot

mechanically refrigerated car and seek to charge only per-car rates; that motor carrier service is particularly inadequate in regard to LTL shipments; and that carriers should be found to be obligated to transport in a safe manner all commodities for which they have authority.

NITL is an organization of shippers and shipper associations. It submits that clearer definitions of what is meant by the terms "perishable commodities" and "protective service" are necessary, and that the free flow of commerce requires damage-free transportation. The Lincoln Chamber of Commerce adopts the statements of NITL.

PPG manufactures glass and industrial chemicals, coatings, and resins. There has been an increase in the need for protection of paint from cold during the winter because of the accelerated use of water-based paints. Once this type of paint is frozen, PPG considers it worthless. It has had difficulties shipping commodities requiring protective service in joint-line service, in LTL shipments weighing less than 5,000 pounds, and in situations where the temperature falls below 10°F. PPG ships products which cannot be shipped in a vehicle with an open flame (butane heater), and it objects to shippers having to coordinate their schedules to those of the carriers. It states that there is a need for more uniformity in the freezable rules utilized by motor carriers.

Sunkist is a cooperative marketing association of citrus fruits which require protection against heat as well as cold on a continuing basis. It states that section 1(3) of the act obligates rail carriers to provide protective service, whereas, the motor carrier transportation of citrus fruits in truckload lots is exempt from this Commission's regulation. It stated that ice bunker cars were an effective instrument for handling perishable food products; that the capacity of refrigerated cars has been diminishing; and that the railroads are not acting to prevent a car shortage. Sunkist contends that there is an increasing shift from rail to motor transportation which may increase air pollution and traffic congestion and adversely affect the quality of the human environment.

Swift and its affiliates ship various commodities such as margarine and adhesives which require protective service. They assertedly have found LTL protective service inadequate and have been forced to use private carriage to serve their customers.

Travenol contends that this investigation should not be broadened to include contract carriers, water carriers, brokers, or rail carriers. It defines a product requiring protective service as one which does

not experience damage when carried under normal service within a range of temperatures (from about 32°F. to 90°F.). On the other hand, it defines perishable service as that which prevents the deterioration of a product able to withstand a very narrow range of temperatures (such as between 35°F. and 50°F.). Petitioner asserts that many motor common carriers follow practices which affect the movements of small shipments, and that these include such policies as no pickups on Thursday or Friday, single-line service only, service available on shipments weighing in excess of 5,000 pounds, service at shipper's risk, and no service below a specified temperature. Travenol complains that many large carriers purchase smaller carriers and discontinue protective services and that certain carriers will only accept the involved lading when it is shipped at the shipper's risk. It alleges that carrier services are inconsistent, and as an example states that Roadway Express accepts shipments from southern points for northern destinations, but will not accept shipments from Morton Grove, Ill. Petitioner no longer sees a need for new regulations or legislation because it contends that these issues have been decided and need only affirmation. It suggests that this proceeding be left open for shippers to file protective service complaints without the necessity of filing a separate formal complaint each time a carrier fails to perform; and that emergency temporary authority should be granted to any person who applies to haul products requiring protective service.

Upjohn's Polymer Chemicals Division produces chemicals and synthetic plastics which require temperature control in transit. It represents that more than 99 percent of its temperature-controlled products move in truckload quantities because of the unavailability of protective service on LTL quantities. To obtain adequate protective service, Upjohn successfully supported Trans-Cold Express for appropriate authority. It states that it has not been able to receive adequate service from Ryder and Brown in control of Spector and that Consolidated Freightways, Lee Way Motor Freight, and Yellow Freight Systems ceased their protective service operations. Upjohn has found that there are insufficient numbers of temperature-controlled equipment available from existing carriers; and that TOFC protective service is inadequate because of the carrier's inability to serve many destinations, of failure to provide proper protective service in transit, and of damage to lading. It contends that all general-commodity carriers should be required to provide protective services.

Western is a trade organization of California and Arizona growers of fresh vegetables, potatoes, melons, and strawberries. Its members ship over 200,000 carloads of these commodities a year by rail. It contends that rail carriers are statutorily obligated to provide protective services, that the railroads are permitting their refrigerator space to diminish; and that the railroads may be able to speed up their service (i.e., the railroads now are said to average only 21.4 miles per hour on a cross-country haul).

Governmental interests.—The Bureau of Enforcement presented information obtained from an investigation and survey of the protective services offered by 24 railroads, 78 motor carriers, REA Express, 9 forwarders, 6 water carriers, and 6 brokers. It found that of the latter 21 entities, only 4 forwarders, 2 water carriers, and 2 brokers rendered any protective service of any nature. In addition, it surveyed 68 shippers and receivers of perishables. The Bureau reports that this Commission's 76 field offices throughout the Nation received a total of 48 protective-service complaints during the first 6 months of 1972; that none of these complaints involved brokers, forwarders, or water carriers; and that in practically every instance, the complaint was registered against a certificated motor carrier and involved small shipments of foods, medicines, and drugs. It appears that every shipment involved weighed less than 5,000 pounds. The Bureau reports that about half of these involve alleged delays in transit rather than a lack or shortage of protective equipment. It submits that the shippers have weeded out those carriers that have refused to provide protective service and no longer consider those carriers in their search for service. The Bureau reports that rail carriers provide practically no LCL service, but do provide protective services in carload lots although they usually require between 24 and 48 hours advance notice. It states that field reports indicate that the railroads have no tariff restrictions against protective service, that no refusals were noted, that all requests were promptly filled, and that the railroads provide an adequate and reliable level of protective services.

The Bureau asserts that specialized motor carriers handle most of the protective-service traffic now moving by motor carrier, and that these carriers appear to discourage LTL traffic. Equipment shortages were found to be rare by the Bureau and to occur mostly during the weather extremes. When such shortages do occur, however, the carriers give preference to their regular customers. The Bureau submits that field reports establish that the greater the protective care needed for a product, the greater the inclination by

the shipper towards private or contract carriage; that on shipments requiring heat, even specialized carriers cut back on service when the weather goes below freezing as portable heaters are not practical or effective in below freezing weather conditions; and that, as described by petitioner, many tariffs fix rates for protective service subject to suitable equipment being available. Carriers reported to the Bureau that they would refuse perishable shipments requiring interlining unless such interline arrangements with a connecting carrier for delivery have been made in advance; and that carriers providing heaters encounter difficulties in obtaining their return from connecting carriers. According to the Bureau, this Commission's field staff reports describe existing levels of protective services as generally adequate. Outright refusals of service and delays in response to shipper requests are traceable mainly to LTL shipments and, then, to shipments that involve multiple-line service.

The Bureau found that domestic water carriers neither offer nor are they called upon by the public to render protective service to any significant extent; and that brokers are not a significant element in the area of protective service because they depend on motor carriers to provide this service. As indicated earlier, freight forwarders and REA were shown to provide a very limited amount of protective service.

Of the 68 shippers surveyed by the Bureau, 44 stated that they encountered almost no difficulty in obtaining protective services from carriers whether on carload, truckload, or LTL shipments. The other 24 shippers reported infrequent refusals, delays, or other difficulty in obtaining protective services in connection with carload and truckload shipments, except in instances of subfreezing weather when heated equipment shortages occur. These shippers expressed greatest dissatisfaction with LTL services and multiple-line service. Most shippers seek other carriers when an LTL shipment is refused (eight resort to private carriage, two curtail operations, and six use airfreight in an emergency). Fifteen shippers of drugs, medicines, and blood plasma were interviewed and 10 of these shippers reported almost no difficulty in securing protective service. The remaining five shippers reported difficulties related to LTL shipments and the unavailability of heater equipment during cold weather periods. Two shippers reportedly urge hospitals to stockpile vital products in anticipation of winter and include discounts to customers on volume orders.

The Bureau contends that all entities holding appropriate operating authority have the obligation to furnish or provide for

protective services; that the full service regulation adopted in the *Restrictions* case applies to motor common carrier protective service, and that it should be extended to apply to other regulated carriers in this respect. The Bureau also suggests that we propose legislation as we have done in the past, to amend section 216(c) of the Interstate Commerce Act so as to require motor common carriers to establish reasonable through routes and joint rates because of the difficulties encountered by shippers seeking to use multiple-line services. The Bureau avers that the *Eichholz* rule is still viable and should apply to carriers which operate protective equipment; that tariff provisions seeking to eliminate a carrier's obligation to provide protective service are unreasonable and unlawful because they constitute an avoidance of a common carrier's fundamental legal obligation; and that such tariff provisions are unjustly discriminatory and unreasonably prejudicial to shipments requiring protective service. It asserts that tariff provisions for protective service by railroads which condition performance to the availability of suitable equipment were condemned by the decision in *Swift & Co.* v. *B. & O. R. R. Co.*, 21 I.C.C. 241 (1911). It suggests adoption of a regulation which would require that such tariff publications of all carriers and freight forwarders be rejected or suspended for investigation.

CCC ships a substantial volume of agricultural products which require protective service. It has on occasion encountered difficulty in obtaining protective service by rail. It complains of added costs when the railroads provide water-ice cars instead of mechanically refrigerated cars, and represents that water-ice cars do not cool as effectively as refrigerated cars. It states that railroads must expand their mechanically refrigerated car fleet or face more serious car shortages in the future.

Reply Statements

Motor carriers.—Colonial contends that the initial shippers' statements are vague and generally fail to refer to the role of specialized motor common cariers. It represents that although general-commodity carriers have demonstrated a general lack of interest in temperature control traffic Colonial has had applications denied on the alleged availability of the general-commodity carrier's service. It agrees with the position of MCCFA that this Commission has no jurisdiction to require motor carriers to offer a full protective service. Colonial asserts that it offers truckload and LTL protective

services to points within the scope of its authorities; that ITT, Continental, and Blue Anchor, major shippers of perishables, have noted no inadequacies in existing motor carrier protective service; and that certain shippers are supporting this petition in an attempt to obtain lower rates. Continental reasserts its position that motor contract carriers should not be included in this investigation.

M-F and Poplarville contend that we should hold that motor common carriers are subject to the rule of the *Eichholz* case and are not required to provide protective service to meet the obligations imposed upon them by their certificates. It states that the shippers have not demonstrated that existing services are inadequate; and that it is illogical and unreasonable to expect a carrier to accept a shipment that the carrier knows will be damaged and the carrier will be liable for its value. Such tariff rules should not be construed as limitations upon available service according to M&N.

Motor carrier associations.—ATA believes that the initial statements support its position that general-commodity carriers, to the extent of their abilities, as well as specialized refrigerated carriers, are providing the public with reasonably adequate motor carrier service on commodities which occasionally, because of extreme temperatures, require protective service. It points out that Refrigerated has established regularly scheduled LTL services on perishables whenever such service has been found to be responsive to the needs of the shipping public. ATA asserts that shippers make varying demands for protective service without regard to the efficiency and economy of a carrier's operation and without any degree of uniformity with other shippers requiring protective service. For example, AHSC ships blood serum at a temperature between 35° and 40°, while Swift ships shortenings at 50° to 70°. This diverse traffic is difficult to handle in LTL quantities, but ATA states that the shippers do not attempt to improve packaging to protect the lading better or to consolidate like shipments. It is averred that the Bureau's statement demonstrates that carrier practices are not having an adverse effect on the movement of freight or the interest of shippers, receivers, and ultimate consumers; and that relatively few shippers have thought this problem significant enough to participate in this proceeding.

Common Carrier Conference-Irregular Route, which has about 500 motor carrier members, contends that existing irregular-route motor common carriers are fulfilling their responsibilities and, therefore, no reason exists for this rulemaking proceeding as to them. It asserts that a relatively small number of shippers'

statements were filed, that a number of these shipper statements had no complaints regarding motor carrier service, that the Bureau's study shows service to be adequate, that the *Eichholz* criteria should continue to govern, that difficulties can be handled on an individual carrier basis, that only a small segment of transportation is involved, and that the shipper statements submitted in this proceeding lack specifics. The Conference submits that shipper assistance in the area of better insulation in packing small LTL perishables would not be out of order.

MCCFA states that the shippers in their initial representations expressed concern with the area of protective services necessitated by temporary weather extremes during winter and especially when LTL traffic requiring interlining is involved. It argues that the record supports a finding that general-commodity carriers provide an adequate service on the involved traffic during the first 3 or 4 days of each week except when the temperature declines to below 10° to 15°. It avers that when extreme temperatures occur, the use of portable heaters in trailers is not sufficient to offset the rigors of the temporarily unusual winter conditions; that the shipping interests have not presented sufficient evidence to permit an evaluation of any inconvenience or economic dislocation caused by existing protective-service programs; and that the Bureau's survey supports the position that existing services are adequate.

NBTA reasserts its prior position that any rule that motorbus operators offer "protective service" would impose upon these carriers a legal obligation in direct conflict with their primary obligation of transporting passengers and their baggage.

RCCC, with a membership of approximately 1,100 general-commodity motor common carriers which operate generally over regular routes, contends that the problems presented are very narrow operational matters and can best be left to the carriers and shippers to work out among themselves. It asserts that shippers have shown only an occasional difficulty with LTL services; that existing services of regular-route carriers are reasonable; and that these carriers should not be required to finance a massive conversion of carrier fleets to temperature-controlled equipment and construction of "warm rooms" at each terminal. It contends that the demands of a few shippers should not be allowed to overshadow carrier responsibility to the general public as a whole.

Railroad interests.—AAR contends that the Bureau's survey indicates that the railroads have diligently been attempting to provide reliable protective services; and that those disagreeing with

the Bureau's statement have failed to substantiate their allegations. Union Pacific and Southern Pacific filed a joint statement asserting that rail service is adequate, that Travenol did not intend this investigation to include rail services, and that railroads should be excluded from any rules adopted in this proceeding.

Tariff associations.—NMFTA, et al., aver that carriers are providing adequate services and that this is borne out by the negligible number of shippers' statements filed, and by the statement of the Bureau. They argue that the difficulties posed by temperature-sensitive commodities are a unique transportation problem and not a part of the overall "small shipments problem"; that the lawfulness of a tariff provision which states that a carrier is not obligated to provide refrigerator or heater service is in question in Docket No. 35498;[1] that the Bureau is wrong in saying that motor carriers have the same duty to provide protective service under part II of the act as the railroads have under part I; and that the intent of section 208 of the statute is to preserve in the motor carriers the managerial discretion to determine the amount and type of equipment needed in the performance of their services.

Southern states that shippers' complaints as to protective service concern seasonal demands, LTL service, and interline service; and that the complaints arise primarily because of the nature of the commodities requiring that service. It seeks reaffirmation of the *Eichholz* rule and asserts that general-commodity carriers should not be expected to make tremendous outlays of capital to serve a few shippers on an inconsistent basis. It questions the lack of action by shippers to alleviate this problem, and suggests exploring means of insuring proper packaging insulation.

Shipping interests.—NSSTC, et al., contend that technology is available to carriers to solve the involved problem in that cargo-safe devices are available to heat trailers without the danger of fire. They aver that many motor carriers offer no protective service or a very limited protective service. They list points throughout the Nation which have normal January minimum temperatures below freezing including Reno, Nev., Albuquerque, N. Mex., Amarillo, Tex., St. Louis, Mo., Little Rock, Ark., Cincinnati, Ohio, and Washington, D.C., but do not suggest that every certificated general commodities

[1] In an initial decision in No. 35498, which was served October 25, 1974, and became effective by operation of law on December 24, 1974, an Administrative Law Judge found that item 810 appearing in the National Motor Freight Classification, A-12, MF-ICC 14, was meaningless and misleading and, therefore, should be canceled. Item 810 provided as follows: "Classes applicable to freight requiring protection from heat or cold do not include the cost of providing such protection and do not obligate the carrier to provide refrigeration or heater service."

carrier in the Nation should be required to provide protective service. They insist: (1) that the shipping public is entitled to know which carriers are available to provide protective service, and (2) that certificates should be restricted against the provision of protective service where none is being provided. They assert that new carriers should be certificated in circumstances where general-commodity carriers are not providing protective services. They aver that *Eichholz* is bad law insofar as regulation of protective service is concerned and, if necessary, should be overruled.

Swift states that it has instituted private carriage operations between Nashville, Tenn., and Atlanta, Ga., because adequate service is not available. It contends that all restrictions against protective service should be removed from tariffs of motor common carriers.

Travenol points out that the *Eichholz* decision was issued in 1938, at a time when the railroads offered less-than-carload service and any other decision would have caused financial ruin to the depression-hit trucking industry. It argues that section 208(a) of the act does not prohibit specifying the type of equipment needed to serve the public, citing *Campus Travel, Inc., Common Carrier Application*, 43 M.C.C. 421 (1944); and that if general commodities do not include products that require protective service, then such carriers should cease hauling these products. It estimates that over 2 billion pounds of freight subject to freezing will have been tendered to common carriers with general-commodity authority in 1972. It contends that specialized carriers do not serve the public generally because (a) they do not handle LTL freight expeditiously, (b) they do not offer heater service and refrigerated service at the same time, and (c) they are not interested in short-haul traffic. Travenol suggests that we order all restrictions against protective service removed from the tariffs of motor common carriers.

Preliminary Matters

Certain persons suggest consolidating this proceeding with No. 35498, *Drug and Toilet Preparation Traffic Conference* v. *Admiral Merchants Motor Freight, Inc.*, or Ex Parte No. 284, *Investigation Into the Need for Defining Reasonable Dispatch (Perishable Commodities)*. As noted in footnote 5 the proceeding in No. 35498 has been concluded. Ex Parte No. 284 generally involves the time required to transport perishable commodities and not the refusal of carriers to accept such shipments. Consolidation of this proceeding

with that proceeding now pending before this Commission is not warranted.

Land O'Lakes requests that we subdivide this proceeding into groups representing the varying problems of the diverse shippers herein and assign each portion of the subdivided proceeding for separate hearing. It appears, however, that the participating shippers have expressed many common views. Land O' Lakes has not suggested what additional evidence might be introduced were its proposal adopted. It is our judgment, therefore, that the evidence already presented is sufficient to support a proper determination. Land O' Lakes' request is hereby denied.

Discussion and Conclusions

In our notice of proposed rulemaking, we stated that we intended to investigate the quality of protective services offered by carriers subject to our regulatory jurisdiction and, if necessary, to promulgate regulations to assure the public of efficient and adequate protective services.

Statutory authority.—Certain parties to this proceeding question the statutory authority of this Commission to promulgate regulations requiring carriers subject to parts II, III, and IV of the act to provide protective services. Most of the parties who commented on the matter of our jurisdiction concede, however, that we have the power to require rail carriers to provide protective services and in that respect only a brief comment is required.

Section 1(4) of the act states that "It shall be the duty of every common carrier subject to this part (part I) to provide and furnish transportation upon reasonable request therefor, ***." Section 1(3)(a) of the act which defines the term "transportation," includes "ventilation, refrigeration or icing" in that definition. And section 1(11) provides that it is the duty of railroads "*** to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable *** practices with respect to car service; ***."

Based on the quoted provisions of part I of the act we think it is clear that we not only may, but must, require rail carriers to provide protective services. Moreover, that we have the requisite authority to do so is further substantiated by other provisions of part I. For example, the Transportation Act of 1920 (41 Stat. 476) specifically added the word "supply" to the definition of car service contained in section 1(10). It also added section 1(21) which authorizes this Commission to order a carrier by railroad to provide itself with

adequate facilities for the provision of car service. Accordingly, we conclude that we have the statutory authority to require the preparation for and the provision of protective services by railroads subject to part I of the act.

Turning next to the matter of our statutory power to require the provision of protective services by part II carriers, we note that we have the undisputed authority pursuant to section 204 of the act to issue reasonable rules and regulations with regard to motor carriers and brokers operating in interstate or foreign commerce. *Traf. at or Near U.S.-Can. Boundary Lines*, 110 M.C.C. 730 (1969). Also, compare *Special Relief for Motor Carriers*, 112 M.C.C. 323 (1970).

Respondent motor carriers argue that section 208(a) of the act prohibits this Commission from imposing terms, conditions, or limitations upon certificates that have the effect of restricting the rights of carriers to add to their equipment and facilities. However, the issue in this proceeding is not whether we might restrict their ability to *add* to their equipment. Clearly a prohibition against that is contained in the final provision of section 208(a). Rather, the issue is whether a carrier subject to part II of the act can be required by this Commission to provide the full service specified in its certificate.

Under section 207 of the act we issue certificates only to *qualified* applicants. The willingness of applicants for authority properly and fully to perform the services they propose must be affirmatively established before a grant can be made. That the certificate must be specific is required by the first provision of section 208(a). Furthermore, the provisions of section 216(b) require every motor common carrier "*** to provide safe and adequate service, equipment, and facilities ***." Section 208(a) also provides that this Commission *shall* "*** at the time of issuance and *from time to time thereafter*, ***" (emphasis added), attach such conditions and limitations to the *exercise* of operating authority granted to a motor carrier pursuant to the provisions of part II of the act.

Our jurisdiction here is different than in the case of railroads subject to part I. Nevertheless, we are satisfied that this Commission has ample authority, by reason of the sections of the Interstate Commerce Act referred to above, to consider the issues presented on this record insofar as part II carriers are concerned.

For reasons set forth later herein, we need not discuss the scope of our authority over the services of those respondents subject to parts III and IV of the act.

Adequacy of existing services.—No significant dissatisfaction was expressed by the shipping interests participating in this proceeding

with the services of water carriers, brokers, freight forwarders, motor contract carriers, and motor common carriers of passengers and household goods. This is explained in part by the fact that these respondents are not generally relied upon by the shipping public to provide protective services of the type under consideration.

Protective services are required by shippers in two instances. In the first, shippers requiring the transportation of perishable commodities rely generally on railroads and specialized motor carriers capable of providing temperature control on a year-round basis. Determining the adequacy of services available to these shippers is not complicated.

In the second instance, shippers which produce commodities that normally can be shipped without any temperature control require protective service for their products during periods of temperature extremes. Commodities in this category, such as chocolate and paint, consistently are shipped via motor common carriers of general commodities which, for the most part, maintain only limited amounts of temperature-control equipment.

Representations filed by Armour-Dial, American Hospital Supply Corporation, Midwest Packers Traffic Association, and Swift, urge us to find that services generally provided by railroads and motor common carriers of property on shipments requiring protective service are inadequate. They point out that certain major carriers, such as Roadway and UPS, provide no such service; others provide it on a limited basis only; and one shipper, Upjohn, claims it ships 99 percent of its products requiring protective service in truckload lots because such service is unavailable on LTL quantities. The representations of Land O' Lakes, NAFC, Sunkist, and Western Growers Association draw attention to the phasing out of ice bunker service by railroads and that the number of mechanically refrigerated cars could, in time, possibly prove to be inadequate. Other shippers complain that rail rates are increasing, that the availability of refrigerated equipment is declining, and that the remaining refrigerated equipment is being poorly maintained. On the surface these assertions suggest that the absence of more fully responsive protective services in the overall services provided by railroads and motor common carriers of property renders their services inadequate. This, however, upon closer consideration, does not appear to us to be the case.

In *Icing Services, U. S. Railroads*, 343 I.C.C. 67 (1973), we found, by virtue of the fact that ice refrigeration in railcars is becoming obsolete, that railroads should be permitted to cancel ice bunker

services. Such permission could not there have been granted, however, had the record in that proceeding not established to our satisfaction that such services were being replaced by cars equipped to provide mechanical protective service. Rate increases received by the railroads in recent years have been necessary to permit them to continue to operate in an efficient and economic manner and to replace faltering equipment with the latest technological innovations. We fully expect railroads to increase their supply of needed equipment to meet future increases in demands and we shall continue to monitor their performance in that regard.

It also is important to note that insofar as railroads are concerned, the Bureau reports that this Commission's field offices have received no complaints regarding the *refusal* of any railroad to provide temperature-control equipment in a timely manner. The Bureau received 48 complaints over a period of 6 months. About half of these related to delays in transit. None, however, related to a refusal to provide service. In light of these facts, coupled with the volume of perishable traffic railroads continue to handle, such service cannot properly be characterized as inadequate.

Certain shippers of perishable commodities have available to them the services of motor common carriers specializing in the transportation of commodities requiring temperature control. These shippers work on a year-round basis with specialized carriers. A majority of such shippers interviewed by the Bureau described the services they receive as generally satisfactory. One of the parties, Continental, stated that it found no inadequacies in such service. Specialized carriers usually rely on their regular customers for large volumes of traffic each year. Thus, they are willing to accommodate a shipper's special needs in order to retain its traffic. This portrays a generally healthy and competitive climate for the traffic of such shippers and serves to explain, in part, their general satisfaction with the services they are provided.

Another circumstance we believe accounts for a generally satisfactory level of service to such shippers is the fact that a shipper can support a new or competing carrier seeking authority whenever a specialized or other carrier's service proves to be inadequate. Thus, whenever an existing carrier does not consistently have available adequate amounts of suitable equipment, a shipper in need of protective services has the alternative of seeking the services of other authorized carriers or supporting the licensing of additional motor carriers through appropriate application proceedings. See *Querner Truck Lines, Inc., Ext.—Plainview*, 115 M.C.C. 304 (1971).

On the basis of the foregoing we are persuaded that the availability of protective services on those commodities which normally require temperature control throughout the year is generally adequate.

Service during periods of temperature extreme.—The manufacture of commodities such as water-base paints, intravenous solutions, margarine, adhesives, chocolate, and others, which require protective services in transit only under certain climatic conditions, has expanded immensely since this Commission rendered the decision in the *Eichholz* case, *supra*. Certain shippers of such commodities allege that the protective services they now require are not available in sufficient quantity from motor common carriers of general commodities.

It is generally argued by respondents authorized to transport general commodities that for periods of extreme heat or cold, adequacy in the transportation of certain commodities will not be achieved in an economically sound manner by requiring general-commodity carriers to purchase and have on hand temperature-controlled equipment; that when such commodities require temperature control, they are not conducive to handling by general-commodity carriers; that the nature of general-commodity regular-route service is a multiple-pickup and delivery service involving LTL quantities of various commodities; and that such service requires numerous openings of trailer and truck doors which upset temperature control and may cause damage to perishable lading. They further maintain that the record amply demonstrates that a temperature level needed to protect one commodity may be such as would cause damage to another commodity.

The Bureau's study reveals that although two-thirds of the shippers interviewed found no difficulty in obtaining either LTL or truckload protective service, the remaining one-third had problems during periods of extreme temperature.

The provision of protective services by motor common carriers of property has been evaluated since 1938 largely on the basis of the principle established in the *Eichholz* case. As indicated in footnote 4, that decision stands for the basic proposition that tariff rules concerning protective services properly may impose a duty on shippers to ascertain the availability of suitable equipment.

Common Carrier Conference-Irregular Route and SMCRC believe the *Eichholz* rule should be reaffirmed and the Bureau agrees. The Bureau notes, however, that the rule applies only to carriers which operate protective equipment. It believes that tariff provisions designed to limit such a carrier's obligation to provide

protective services are unlawful and discriminatory. On the other hand, petitioners, NSSTC, et al., and others characterize the *Eichholz* principle as either bad law or an anachronism because (1) it was enunciated when rail service on commodities requiring protective service was more adequate than it is today, (2) the trucking industry, then in its infancy, was in the process of recovering from an economic depression, and (3) when general-commodity carriers maintain no protective equipment, the current validity of the rule is, as a result of this Commission's decision in the *Restrictions* case, *supra*, placed in doubt.

Current effect of the Eichholz rule.—Petitioner estimated that over 2 billion pounds of property subject to freezing would be tendered in 1972 to motor common carriers with general-commodity authority. This need for protective services is expanding. Moreover, the variety today of commodities which during certain seasons require only occasional temperature control in transit in order to maintain their quality is considerably broader than it was several years ago. It also is true, however, that insulation material, refrigeration, and heating equipment are more efficient, effective, economical, and widely available than was the case when the *Eichholz* principle was first announced. These are factors, therefore, which must be kept in mind as the current appropriateness of the *Eichholz* rule is examined in light of the *Restrictions* case.

The rationale of the *Restrictions* case is that carriers holding operating rights are dutybound fully and fairly to render the services authorized by their certificates. They cannot limit the duty by publication in their tariffs of provisions which restrict the availability of service. In essence, the *Eichholz* case recognized that shippers should not expect carriers to have protective equipment available at all times and at all places. In our opinion, the underlying reasons for that are as valid today as they were in the 1930's. When suitable protective equipment is available there is no question but that, under the rule, a motor common carrier of general commodities is obligated to provide fully its authorized services with respect to commodities that are tendered to it.

The matter now before us, however, raises two additional questions: (1) whether a motor common carrier authorized to transport general commodities is or can be required to maintain at least some protective equipment; and, if not (2) whether at any given time, when equipment suitable for the transportation of a given commodity is not available, either by carrier design, or otherwise, the duty to serve is thereby lessened and properly may be reflected by appropriate tariff provisions.

The great preponderance of traffic typically offered to general-commodity carriers does not require transportation to be performed in vehicles equipped to maintain controlled temperatures and the cost of acquiring and expense of maintaining infrequently utilized equipment eventually must be born by the shipping public, many members of which would never derive any benefit therefrom.

Obviously, the safe transportation of a commodity which requires protection only from extreme heat or cold presents a peculiar problem. In fact, it presents a situation in which the requirements for safe transportation cannot accurately be predicted and which can even change after service has been initiated. The record discloses that shippers of such commodities are generally informed in advance of seasons when extreme weather conditions occur and of the carriers' transportation policies in regard to the provision of protective services. We believe that is reasonable as long as the policies announced are fairly applied.

Based on the record in this proceeding, we cannot conclude that it is unreasonable or inconsistent with the public interest for general-commodity carriers to elect not to acquire and maintain temperature-control equipment. Accordingly, we believe that it is lawful for them to decline to provide transportation when they are tendered commodities which they cannot transport safely at that time without such equipment.

We find no support in the *Restrictions* case for the argument of certain shippers that unless general-commodity carriers provide protective service on a year-round basis, their authority to transport such commodities when protection is not required should be canceled. To the contrary, we are convinced that the *Eichholz* principle continues to be a valid basic standard against which the duty of motor common carriers of general commodities to transport perishable commodities ought to be measured.

It is impractical, in our judgment, to measure service adequacy by literally interpreting the term general commodities and applying the duty to serve without regard to extreme fluctuations in temperature. To do so would ignore the practicalities of providing transportation services, especially those required of regular-route carriers.

The effect of temperature extremes on certain commodities and the ability of responsible carriers safely to transport them under adverse conditions must be weighed against the economic feasibility of requiring the provision of complete service. Motor common carriers of general commodities should not, in our opinion, be expected to meet every conceivable transportation requirement of

every imaginable commodity without regard to the circumstances under which the transportation must be performed. Accordingly, we find that the principle enunciated in the *Eichholz* case, insofar as it pertains to limiting the duty to serve when suitable equipment is unavailable, is valid.

Tariff provisions.—We turn now to the second question dealing with the current effect of the *Eichholz* principle. As noted, the *Restrictions* case holds that motor common carriers of property cannot be permitted to publish provisions in their tariffs which limit the duty to serve. And the *Eichholz* decision is based on the rationale that tariff rules concerning protective service should provide that shippers must ascertain when suitable equipment is available for the transportation of perishable commodities. These decisions might appear to conflict. However, we do not believe that they are inharmonious.

The indiscriminate holding out of service to the public is the dominant characteristic of motor common carriage. Section 203(a)(14) of the act defines the term "common carrier by motor vehicle" as any person which holds itself out to engage in the transportation by motor vehicle in interstate commerce of property or any class or classes thereof for compensation. Traffic selectivity by common carriers cannot be condoned by this Commission and that, in essence, is what we said in the *Restrictions* case. On the other hand, however, while the legal duty of a common carrier approaches that of being absolute, it is not without its exceptions.

Each certificate of public convenience and necessity is granted upon the condition that the motor common carrier to which it is issued will render *reasonably continuous and adequate service* to the public pursuant to the authority granted. In our opinion, the shipping interests which argue that publication of a tariff provision of the type suggested in *Eichholz* now would amount to an embargo on certain types of traffic, have overlooked the reasonableness qualification that is a traditional part of the duty to serve.

For a motor carrier to accept a shipment which it has reason to believe would be damaged in transit would not be in the public interest. It is important to note that petitioner and certain other shipping interests, such as the NSSTC and those organizations which join in its statement, readily admit that a motor carrier should not accept a shipment which it cannot adequately and safely transport. They also agree that not all carriers of general commodities should be required to provide protective services. However, their contention that general-commodity carriers should be *responsible*

for transporting *all commodities* they are authorized to transport and that they should be *required* by us to provide appropriate equipment therefor fails to take into consideration the situation in which such inflexibility amounts to unreasonableness.

The reason some general-commodity carriers will pick up commodities susceptible to temperatures damage only on Mondays, Tuesdays, and Wednesdays is because they do not possess storage facilities safely to keep commodities requiring temperature control over a weekend. They should not be expected to accept shipments if the temperature is extreme or if interlining is required and connecting carriers are unable safely to transport the involved commodities. In our opinion, these limitations on service, as they are referred to by petitioner, do not constitute an attempt by the involved motor carriers to be selective in the traffic they will handle. The record before us is sufficient to conclude that motor common carriers of general commodities are providing adequate services.

Limited exceptions to the duty to serve were recognized in the *Restrictions* case, 111 M.C.C. at 167, 168. There the following was quoted from the decision in *National Furniture Traffic Conf.* v. *Assoc. Truck*, 332 I.C.C. 802, affirmed *sub nom., Associated Truck Lines, Inc.* v. *United States*, 304 F. Supp. 1094 (W.D. Mich. 1969):

> *** [Motor common carriers] are obligated to accept and transport all freight offered to them in accordance with the provisions of their certificates, and this duty is, *with limited exceptions*, an absolute one. *** Motor common carriers are engaged in what has always been regarded as the public's business, and must, *to the best of their abilities*, serve all who seek their service, and serve them equally and fairly. [Emphasis added.]

Similarly, the provisions of section 216(d) of the act declare unlawful only those practices of motor common carriers which cause "undue or unreasonable preference or advantage" to be given to any shipper or description of traffic.

We are of the opinion that it is reasonable for motor common carriers to publish tariff provisions such as those suggested in the *Eichholz* decision. Furthermore, it is manifestly reasonable, in our judgment, for them to decline to transport commodities which, at the time of tender cannot safely be transported because of climatic conditions wholly beyond their ability to control. We believe that, as argued by M-F and Poplarville, the continued application of the *Eichholz* principle will provide an opportunity for shippers and

For the reasons given above, we conclude that the *Restrictions* decision does not proscribe publication in the tariffs of motor common carriers of general commodities having no or only limited amounts of temperature-control equipment and facilities, reasonable rules with respect to the services provided. Such rules may impose on shippers a duty to ascertain before tendering a shipment whether suitable equipment is available for the transportation of commodities which are subject to deterioration or damage during periods of temperature extremes.

Environmental considerations.—Sunkist contends that increased rail rates and charges are causing shifts in the transportation of perishables from rail to truck. The question of the reasonableness of rail rates is not an appropriate subject herein and should be raised by Sunkist in a relevant rate complaint proceeding.

In view of the foregoing, our order discontinues this investigation.

FINDINGS

Upon consideration of the record herein, we find:

(1) That the Interstate Commerce Commission has jurisdiction under sections 1(3)(a), (4), (10), (11), and (21), 204, 208(a), and 216(b) and (d) of the Interstate Commerce Act of conduct the investigation undertaken herein and to make findings thereon;

(2) That the provision by railroads subject to part I of the act of facilities and of protective services upon request is reasonably adequate;

(3) That the provision of protective services by motor common carriers of property subject to part II of the act is reasonably adequate;

(4) That the provision of protective service by water carriers, brokers, freight forwarders, motor contract carriers, and motor common carriers of passengers and household goods is not generally required by the shipping public, has not been the subject of any public dissatisfaction, and is, therefore, found to be reasonably adequate;

(5) That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; and

(6) That this proceeding should be discontinued. An appropriate order will be entered.

COMMISSIONER CORBER concurring in the result.

APPENDIX

Initial representations

Motor carriers
Colonial Refrigerated Transportation, Inc. (Birmingham, Ala.)
Continental Contract Carrier Corp. (City of Industry, Calif.)
B. J. McAdams, Inc. (North Little Rock, Ark.)
M-F Express, Inc., and Poplarville Truck Line, Inc.
Michigan & Nebraska Transit Co., Inc. (Kalamazoo, Mich.)
Refrigerated Food Express, Inc.
The Santa Fe Trail Transportation Company

Motor Carrier Associations
American Trucking Associations, Inc. (Washington, D.C.)
Household Goods Carriers' Bureau (Arlington, Va.)
Motor Carriers Central Freight Association (Lansing, Mich.)
National Bus Traffic Association, Inc. (Chicago, Ill.)

Tariff Associations
Central & Southern Motor Freight Tariff Association, Incorporated (Louisville, Ky.)
National Motor Freight Traffic Association, Inc., National Classification Committee, Central and Southern Motor Freight Tariff Association, Inc., Central States Motor Freight Bureau, Inc., The Eastern Central Motor Carriers Association, Inc., Middle Atlantic Conference, Middlewest Motor Freight Bureau, The New England Motor Rate Bureau, Inc., Niagara Frontier Tariff Bureau, Inc., Pacific Inland Tariff Bureau, Rocky Mountain Motor Tariff Bureau, Inc., Southern Motor Carriers Rate Conference, and Southwestern Motor Freight Bureau, Inc.
Southern Motor Carriers Rate Conference, Inc.

Shipping Interests
Adhesive and Sealant Council (Parkridge, Ill.)
American Hospital Supply Corporation (Evanston, Ill.)
Armour-Dial, Inc., and Armour and Company (Phoenix, Ariz.)
Blue Anchor, Inc. (Sacramento, Calif.)
ITT Continental Baking Company, Inc. (Rye, N.Y.)
Land O'Lakes, Inc.
Lincoln Chamber of Commerce (Lincoln, Nebr.)
Midwest Packers Traffic Association
National Association of Food Chains
National Industrial Traffic League (Washington, D.C.)
PPG Industries, Inc. (Pittsburgh, Pa.)
Sunkist Growers, Inc.
Swift & Company, Inc.
Travenol Laboratories, Inc.
The Upjohn Company (Kalamazoo, Mich.)
Western Growers Association (Los Angeles, Calif.)

Governmental Interests
Bureau of Enforcement, Interstate Commerce Commission
Commodity Credit Corporation, United States Department of Agriculture

Replies

Motor Carriers
Colonial Refrigerated Transportation, Inc.
Continental Contract Carrier Corp.
M-F Express, Inc., and Poplarville Truck Line, Inc.
Michigan & Nebraska Transit Co., Inc.

Motor Carrier Associations
American Trucking Associations, Inc.
Common Carrier Conference-Irregular Route
Motor Carriers Central Freight Association, Inc.
National Bus Traffic Association, Inc.
Regular Common Carrier Conference

Railroad Interests
Association of American Railroads
Union Pacific Railroad Company and Southern Pacific Transportation Company

Tariff Associations
National Motor Freight Traffic Association, Inc., National Classification Committee, Central and Southern Motor Freight Tariff Association, Inc., Central States Motor Freight Bureau, Inc., The Eastern Central Motor Carriers Association, Inc., Middle Atlantic Conference, Middlewest Motor Freight Bureau, The New England Motor Rate Bureau, Inc., Niagara Frontier Tariff Bureau, Inc., Pacific Inland Tariff Bureau, Rocky Mountain Motor Tariff Bureau, Inc., Southern Motor Carriers Rate Conference, and Southwestern Motor Freight Bureau, Inc.
Southern Motor Carriers Rate Conference, Inc.

Shipping Interests
National Small Shipments Traffic Conference and Drug, Toilet Preparations Traffic Conference, and The Eastern Industrial Traffic League
Swift & Company
Travenol Laboratories

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 17th day of April 1975.

No. MC-C-7599

TRAVENOL LABORATORIES, INC., PETITION FOR INVESTIGATION—PROTECTIVE SERVICE

Investigation of the matters and things involved in this proceeding having been made, and this Commission, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said proceeding be, and it is hereby, discontinued.

By the Commission.

ROBERT L. OSWALD,

(SEAL) Secretary.

From ATA Reply to Petitions for Reconsideration

potentially handle goods requiring protective service and would not guarantee that other carriers would fill the service void.

It is more logical for a shipper that is having legitimate service problems with a motor common carrier to give its business to a competing carrier or support another carrier seeking new authority. This suggestion, made by the Commission herein, is not an empty one, as petitioners suggest. Firstly, the evidence of record shows that there is no shortage of protective equipment even among general freight carriers vis-a-vis the volume of the traffic to be handled,[9] and that most shippers are having their protective service needs adequately met. Secondly, support of a carrier for new operating rights is not a vain gesture. The Commission's Annual Report for 1973 shows that 5,240 applications for new authority were received that year, and 4,299 were granted in whole or in part. (Interstate Commerce Commission, 87th Annual Report 31)

3. Application of The Eichholz Rule is Not Contrary to The National Transportation Policy.

Contrary to petitioners' claims, the Commission's decision herein is encouraged by the National Transportation Policy and not condemned by it. The policy goals of fostering safe, adequate, economical

[9] Figures gathered by the ATA Research and Transport Economics Department revealed that in 1970, 578 of 632 Class I general freight carriers owned protective service equipment and that by 1972, 214 of these carriers owned 7,201 pieces of refrigerated equipment. Moreover, there existed general inventory of some 200,000 reefer units and 100,000 insulated pieces of equipment in 1972. (See ATA Initial Statement at 12)

ORDER OCT 6 1975

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 29th day of September , 1975.

No. MC-C-7599

TRAVENOL LABORATORIES, INC., PETITION FOR INVESTIGATION PROTECTIVE SERVICE

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of Travenol Laboratories, Inc., filed June 30, 1975, for reconsideration;

(2) Petition of the Adhesive & Sealant Council, Inc., filed July 7, 1975, for reconsideration;

(3) Petition of Hershey Foods Corporation, filed July 7, 1975, for reconsideration;

(4) Petition of the National Industrial Traffic League, filed July 7, 1975, for reconsideration;

(5) Joint petition of National Small Shipments Traffic Conference and Eastern Industrial Traffic League, filed July 7, 1975, for reconsideration;

(6) Reply by Southern Motor Carriers Rate Conference, Inc., filed July 25, 1975, to the petitions in (1) through (5) above;

(7) Reply by Regular Common Carrier Conference, filed July 28, 1975, to the petitions in (2) through (5) above;

(8) Reply by Motor Carriers Central Freight Association, filed August 9, 1975, to the petitions in (1) through (5) a bove;

(9) Joint reply by National Motor Freight Traffic Association, Inc., and National Classification Committee, et al., filed August 11, 1975, to the petitions in (1), (2), (4), and (5) above;

(10) Reply of American Trucking Associations, Inc., filed August 11, 1975, to the petitions in (1) through (5) above;

and good cause appearing therefor:

It is ordered, That the petitions in (1) through (5) above be, and they are hereby, denied, for the reason that the pleadings present no new or material matters of fact or law not adequately considered and properly disposed of by the Commission in its report and order of April 17, 1975, in the above-entitled proceeding, which findings are in accordance with the evidence and the applicable law, and that no sufficient or proper cause appears for granting the relief sought.

By the Commission.

ROBERT L. OSWALD.

Supreme Court, U. S.
FILED
APR 18 1977
MICHAEL RODAK, JR., CLERK

No. 76-1290

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

THE ADHESIVES AND SEALANT COUNCIL, INC.
THE ADHESIVES MANUFACTURERS ASSOCIATION
NATIONAL CONFECTIONERS TRAFFIC CONFERENCE
NATIONAL PAINT AND COATINGS ASSOCIATION, INC.
NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.
HERSHEY FOODS CORPORATION,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
UNITED STATES OF AMERICA,
Respondents.

JOINT BRIEF IN OPPOSITION OF RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC., REGULAR COMMON CARRIER CONFERENCE, INC., NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. AND MOTOR CARRIERS CENTRAL FREIGHT ASSOCIATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1290

THE ADHESIVES AND SEALANT COUNCIL, INC.
THE ADHESIVES MANUFACTURERS ASSOCIATION
NATIONAL CONFECTIONERS TRAFFIC CONFERENCE
NATIONAL PAINT AND COATINGS ASSOCIATION, INC.
NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.
HERSHEY FOODS CORPORATION,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
UNITED STATES OF AMERICA,
Respondents.

JOINT BRIEF IN OPPOSITION OF RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC., REGULAR COMMON CARRIER CONFERENCE, INC., NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
AND
MOTOR CARRIERS CENTRAL FREIGHT ASSOCIATION

OPINION AND DECISION BELOW

The Judgment and Memorandum Opinion of the Court of Appeals are not reported. However, they are attached

as Appendix A to the Petition for a Writ of Certiorari. The Report and Order of the Interstate Commerce Commission (Appendix B of the Petition) are reported at 121 M.C.C. 588.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

We believe that the subject matter for review would be more fairly stated if the following language, set forth in italics, is added to the first question presented:

> Whether motor common carriers, who are required by certificates issued under the Interstate Commerce Act to provide adequate transportation for all commodities *subject to "reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require"* [1] may elect not to handle commodities subject to freezing or to damage from extreme heat, *when at the time of tender such commodities cannot safely be transported because of climatic conditions wholly beyond their ability to control?*

STATUTES INVOLVED

In addition to the statutes set forth by Petitioners, the Commission also relied on Section 204(a)(1) of the Interstate Commerce Act to establish jurisdiction and to make findings. Section 204(c) is added because we make reference to it in our argument *infra*.

Section 204(a)(1) [49 U.S.C. § 304(a)(1)]

(a) It shall be the duty of the Commission—

[1] Excerpted from the text of Section 208(a) of the Interstate Commerce Act, 49 U.S.C. 308(a).

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

Section 204(c) [49 U.S.C. § 304(c)]

Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

STATEMENT OF THE CASE

This proceeding was instituted by the Commission in response to a petition filed by Travenol Laboratories, Inc., of Deerfield, Illinois, on September 20, 1971. Travenol therein requested an investigation of motor common carrier practices on protective service, asking specifically whether protective service is the required duty of a motor common carrier authorized by the Commission to transport general commodities.

After considering the Travenol petition and statements filed in response to it by shippers and motor carriers and their respective associations, the Commission issued

a Notice of Proposed Rulemaking and Order on May 23, 1972, to determine the responsibilities of all carriers subject to Commission regulation to provide protective service. Nevertheless, the Commission decided that special attention should remain focused upon the responsibilities of general commodity motor common carriers to provide protective service.

Sixteen shippers and organizations of shippers filed initial presentations. Other representations were received from seven motor carriers, six motor carrier associations, three groups representing railroad interests, fourteen tariff associations, and two government agencies, including the Commission's Bureau of Enforcement, which conducted its own investigation of the various carriers.

Upon consideration of its statutory mandate and the record compiled, the Commission found, in its Report served May 7, 1975:

> That the provision of protective services by motor carriers of property subject to Part II of the Act is reasonably adequate; (App. B of Petition, p. A-36)

and it ordered the proceeding discontinued.

In reaching the above-stated finding, the Commission noted that it has ample authority under the provisions of Sections 204, 208(a) and 216(b) of the Act [49 U.S.C. §§ 304, 308(a) and 316(b)] to regulate the service provided by motor common carriers under the terms of their certificates, including conditions and limitations attached thereto. (App. B of Petition, p. A-28) Although urged to do so by several shippers and shipper groups, the Commission declined to use its authority in this general investigatory proceeding to compel each certificated general commodity motor common carrier to purchase one or more units of protective service equipment. (App. B of Petition, p. A-33) Instead, the Commission stated:

> It is impractical in our judgment to measure service adequacy by literally interpreting the term "general commodities" and applying the duty to serve without regard to extreme fluctuations in temperature. To do so would ignore the practicalities of providing transportation services, especially those required of regular route carriers. (App. B of Petition, p. A-33)

Earlier, it specifically concluded:

> Based on the record in this proceeding, we cannot conclude that it is unreasonable or inconsistent with the public interest for general-commodities carriers to elect not to acquire and maintain temperature-control equipment. Accordingly, we believe that it is lawful for them to decline to provide transportation when they are tendered commodities which they cannot transport safely at all times without such equipment. (App. B of Petition, p. A-33)

The Commission also made it clear that in order "to balance the equities in the transportation of commodities under certain adverse and uncontrollable conditions," the criteria first announced in *Mid-Western Motor Freight Traffic Bureau, Inc.* v. *Eichholz*, 4 M.C.C. 755 (1938) would continue to be the measure for protective service by motor common carriers.[2] *Eichholz* "stands for the basic proposition that tariff rules concerning protective services properly may impose a duty on shippers to ascertain the availability of suitable equipment." (App. B of Petition, p. A-31) In other words, "shippers should not expect carriers to have protective equipment available at all times and all places," (*Id.*, at A-32) but when suitable protective equipment is available from a general commodity motor common carrier, that carrier is "ob-

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[2] The quoted language was inadvertently omitted from Petitioners' reprint of the Commission decision at App. B, p. A-35 of Petition. Specifically, the omitted phrase reads ". . . carriers to balance the equities in the transportation of commodities under certain adverse and uncontrollable conditions."

ligated to provide fully its authorized services with respect to commodities that are tendered to it." (*Ibid.*)

Finally, the Commission specifically stated:

> For the reasons given above, we conclude that the *Restrictions* decision does not proscribe publication in the tariffs of motor common carriers of general commodities having no or only limited amounts of temperature-control equipment and facilities, reasonable rules with respect to the services provided. Such rules may impose on shippers a duty to ascertain before tendering a shipment whether suitable equipment is available for the transportation of commodities which are subject to deterioration or damage during periods of temperature extremes. (App. B of Petition, p. A-37)

Petitions for reconsideration were filed by shipper interests, including Petitioners, and were denied by the Commission's Order of September 29, 1975, thereby exhausting the available administrative remedies. A petition for review was then filed with the Court of Appeals which took jurisdiction under 28 U.S.C. §§ 2321 and 2342. That court entered its Judgment and Memorandum Opinion on December 17, 1976, affirming the Commission's decision and orders. (App. A of Petition, pp. A-1 to A-4)

ARGUMENT

In essence, Petitioners claim (1) that the Interstate Commerce Commission, in this proceeding, went beyond the bounds of reasonable construction to create a novel "monstrosity" in statutory interpretation which will have a pervasively adverse effect on shipper and consumers, and (2) that the Court of Appeals refused to review this assertedly erroneous treatment. On their face, these assertions are highly dubious. On close examination, they prove to be totally without merit.

I. The Commission's Statutory Construction Is Not In Error.

In not requiring motor carriers to obtain and maintain temperature-control equipment to meet every conceivable exigency, the Commission has not given a new interpretation to the duty imposed on motor carriers by 49 U.S.C. § 316(b), or any other pertinent provision of the Interstate Commerce Act. Rather, the Commission has based its decision on the well-established principle that while the legal duty of a common carrier to provide reasonably continuous and adequate service approaches that of being absolute, it is not without its exceptions.[3] Nor should it be. The Commission's conclusion that practical limitations militate against requiring motor carriers to assume the sizable financial burden associated with maintaining highly specialized equipment to meet the needs of a relatively small number of shippers is manifestly reasonable and a natural corollary of the *Eichholz* criteria which it affirmed.

Inasmuch as the range of commodities affected is narrow, and the service needs of these shippers arise only relatively infrequently, the financial burden could never be passed on only to those responsible for creating the burden without elevating tariff charges to the point where they effectively embargo the very traffic they seek to have moved. Realistically, therefore, the burden would have

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[3] See, e.g., Restrictions On Service By Motor Common Carriers, 111 M.C.C. 151, 167-168 (1970), quoting from National Furniture Traffic Conf. v. Assoc. Truck, 332 I.C.C. 802, affirmed sub nom., Associated Truck Lines, Inc. v. United States, 304 F. Supp. 1094 (W.D. Mich. 1969), wherein limited exceptions to the duty to serve were recognized. See also Montgomery Ward & Co., Inc. v. Consolidated Freightways, 42 M.C.C. 225, 231 (1942); Quality Drug Stores, Inc. v. Eastern Frt. Ways, 123 M.C.C. 198, 202 (1975). For additional discussion of cases supporting this point, see "Joint Brief of Intervening Respondents," at 15-16, filed May 19, 1976, United States Court of Appeals For The District of Columbia Circuit.

to be borne by the general shipping public. By not requiring every motor carrier to maintain temperature-control equipment sufficient to meet extreme demands, the Commission has effectively avoided the inherent unfairness of burdening the whole, be it shippers or carriers, with the limited concern of but a few;[4] especially in light of the Commission's unchallenged findings that general commodity motor common carriers are providing reasonably adequate service.

It is also important to note that the Commission has never required general commodity motor common carriers to purchase additional equipment to meet exceptional service demands, and has allowed such carriers to place limitations upon services contemplated under the terms of their certificates where it is manifestly reasonable to do so.[5] Thus, contrary to Petitioners' claim that there is something new and erroneous in the Commission's statutory construction, the approach taken merely reflects the position the Commission has consistently maintained.

The so-called "election privilege" is considerably more restricted than Petitioners would have the Court believe. It pertains *only* to a specific type of specialized equipment, rather than to an undefinable group of commodities. Thus, contrary to Petitioners' cleverly chosen language, it is circumscribed severely. In addition, it does not, as the Court of Appeals ascertained, prevent shippers from bringing a complaint before the Commission against particular motor carriers when such carriers have unreasonably withheld service. (See 49 U.S.C. § 304(c)) And further, the proven application procedures for new motor carrier authority, including temporary authority and emergency temporary authority, are also available to all

[4] Based on the facts, which are unchallenged by Petitioners, the Commission stated essentially the same conclusion. See App. B of Petition, p. A-33.

[5] See Restrictions case, supra, at 161.

shippers. These procedures more than adequately accommodate any need for additional service.

In conclusion, Petitioners' failure to obtain the changes sought did not result from the Commission's application of an erroneous statutory construction; rather it is based upon the lack of justification for the sweeping and impractical remedies they proposed.

II. The Court Below Did Not Err In Its Rejection Of Petitioners' Appeal.

A fair reading of the Memorandum Opinion indicates that, if fault is to be assigned for the failure of Petitioners to obtain the relief they desired on appeal, that fault lies with Petitioners themselves and not with the court below. In light of Petitioners' refusal to challenge the validity of the *Eichholz* criteria upon which the Commission's equipment decision is implicitly grounded, and given Petitioners' inability to clearly articulate exactly what relief they were seeking from the lower court, no other result could have been forthcoming.

Contrary to Petitioners' claim, the lower court did review the Commission's statutory interpretation in the administrative proceeding. The court below determined that the crux of Petitioners' assertion of error on appeal was based on their belief that the claim brought against particular motor common carriers would be rejected *ab initio* by the Commission by reference to the language (i.e., statutory interpretation) in its opinion. To this the lower court replied:

> [It] does not read the Commission's opinion as meaning that under no circumstances would it entertain for investigation and appropriate action a complaint that a particular common carrier is unreasonably and arbitrarily failing to supply the service required of it by the statute and terms of its certificated authority. (App. A of Petition, p. A-4)

To reach this conclusion, the lower court obviously considered the propriety as well as the parameters of the Commission's statutory construction. If the review made of the statutory construction was narrow in its scope, such narrowness resulted from Petitioners' presentation of the issue and not from the lower court's neglect of it.

In any case, the lower court appears to have done all that was required of it given Petitioners' inability to demonstrate that any harm would befall them from affirmation of longstanding Commission policy. Doubtlessly, the fact that Petitioners did not dispute the Commission's finding that the motor carrier service presently being provided is "reasonably adequate" was also viewed as strongly indicative that no harm would result from the Commission's decision.

Finally, inasmuch as Petitioners failed to demonstrate that they will suffer injury, their reference to *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), and other related cases, is inapposite.

CONCLUSION

We respectfully submit, therefore, that Petitioners present no substantial question for the decision of this Court, and that the judgment and decree of the Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nelson J. Cooney, one of the attorneys for Respondent, American Trucking Associations, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of April, 1977, I served copies of the foregoing Brief in Opposition on the several parties hereto, as follows:

1. On The Adhesives And Sealant Council, Inc.; The Adhesives Manufacturers Association; National Confectioners Traffic Conference; National Paint And Coatings Association, Inc.; National Small Shipments Traffic Conference, Inc.; and Hershey Foods Corporation, Petitioners, by mailing copies in duly addressed envelopes, with postage prepaid, to their counsel of record, Charles J. McCarthy and Daniel J. Sweeney, 1750 Pennsylvania Avenue, N.W., Washington, D.C. 20006.

2. On the United States of America, Respondent, by mailing copies in duly addressed envelopes, with postage prepaid, to Honorable Lloyd John Osborn, Solicitor General; Department of Justice, Washington, D.C. 20530; and Honorable Earl J. Silbert, United States Attorney For The District of Columbia, United States Courthouse, 3rd and Constitution Avenue, N.W., Washington, D.C. 20001.

3. On the Interstate Commerce Commission, Respondent, by mailing copies, in duly addressed envelopes, with postage prepaid, to Mark L. Evans, Esq., its General Counsel and Frederick W. Read, Esq., Attorney, at the offices of the Commission, Washington, D.C. 20423.

NELSON J. COONEY

Supreme Court, U. S.
FILED
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No. 76-1290

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE ADHESIVES AND SEALANT COUNCIL, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1290

THE ADHESIVES AND SEALANT COUNCIL, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

In May 1972, the Commission initiated an investigation into the adequacy of protective services[1] provided by all modes of surface transport. Motor common carriers of general commodities—which primarily transport less than-truckload (LTL) shipments of diverse goods—were a special focus of the investigation, because some shippers of products that require protective services only during very

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[1]"Protective service" involves the use of specially designed equipment, such as insulated, heated, or refrigerated trailers, to maintain temperature control during transport. Some commodities, such as dairy products and frozen foods, need protection throughout the year, while others, such as bottled liquids, chocolate, and water-based paints, require protection only during periods of extremely hot or cold weather.

hot or cold weather had complained to the Commission that such carriers sometimes refused to handle their products during periods of extreme temperatures (Pet. App. A-2).

After considering statements submitted by shippers and carriers as well as evidence developed by its Bureau of Enforcement, the Commission determined that all types of surface common carriers—including motor common carriers of general commodities—were providing protective services in a "reasonably adequate" manner (Pet. App. A-36). Accordingly, the Commission discontinued the investigation without issuing any new rules regarding protective services (Pet. App. A-5 to A-39). The Commission's report noted the continuing validity of the principle, first articulated in *Mid-Western Motor Frt. Traffic Bureau, Inc.* v. *Eichholz*, 4 M.C.C. 755, that general commodities carriers may properly publish tariffs which require shippers to determine that protective service equipment is available before they tender perishable shipments.

Petitioners, who are shippers of commodities requiring protection only from extreme heat or cold, petitioned for judicial review. The court of appeals affirmed (Pet. App. A-1 to A-4).

Because petitioners challenged neither the Commission's finding that general commodities carriers were providing protective services in a reasonably adequate manner nor its reaffirmation of the *Eichholz* rule, the court "found it difficult to know exactly what relief they were seeking" (Pet. App. A-3). Under questioning by the court at oral argument, counsel for petitioners explained that petitioners were concerned that certain language in the order might in the future be used by the Commission as a basis for summarily rejecting all complaints alleging failure to provide protective services that might be filed by shippers against particular general commodities carriers (*ibid.*).

In its opinion, the court held that the language of the order did not justify petitioners' fear that shipper complaints would henceforth be summarily rejected (Pet. App. A-4):

> The court does not read the Commission's opinion as meaning that under no circumstances would it entertain for investigation and appropriate action a complaint that a particular common carrier is unreasonably and arbitrarily failing to supply the service required of it by the statute and the terms of its certificated authority. * * * The finding by the Commission in its general investigation that the service presently being provided is "reasonably adequate" does not appear to us to foreclose inquiry by the Commission in appropriate circumstances into the alleged deficiencies of a particular carrier.

The court further held that, inasmuch as petitioners do not question the overall adequacy of the protective services provided by the general commodities carriers, their proper recourse is to file specific complaints with the Commission against any carrier they believe to be unreasonably failing to provide such services.

The decision of the court of appeals is correct and further review is not warranted.

1. Petitioners' main argument is that the Commission wrongly relieved carriers of their statutory duty to serve customers (Pet. 8). This contention reflects a misunderstanding of the Commission's report. The Commission, in a finding unchallenged by petitioners here or in the court of appeals (Pet. App. A-2), determined that the general level of protective services by motor common carriers "is reasonably adequate" (Pet. App. A-36). Because of that record of adequacy, the Commission declined to adopt any general rule requiring all carriers

to possess a certain amount of special equipment, and it discontinued the investigation (Pet. App. A-33, A-36). This does not mean, however, that the Commission granted the carriers a blanket dispensation from providing protective services or that it compromised the carriers' duty, imposed in every carrier's certificate, to perform the service authorized on a "reasonably continuous and adequate basis."[2] Thus, as the court of appeals recognized (Pet. App. A-4), it might well be unreasonable for a particular carrier in some circumstances not to provide protective services, although there is no general requirement that carriers buy and maintain protective equipment. For example, a carrier might have to furnish protective services where there is a high volume of potential traffic requiring them. Shippers remain free to present such complaints to the Commission, and the Commission in proper circumstances will take action to insure that shippers are satisfied. Moreover, the Commission report makes clear that, if at some future date it finds that the general level of protective services no longer is adequate, it has the authority and the will to take effective industry-wide action to improve that service (Pet. App. A-28).

Since the Commission did not rule that carriers are free to dispense with protective services, petitioners' contention that the court of appeals erred in not reviewing the issue (Pet. 11) is unsound.[3] Petitioners will be able

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[2]The Commission writes this language into certificates under the authority of Section 204a(1) of the Interstate Commerce Act, 49 U.S.C. 304a(1).

[3]Petitioners quote *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, and *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (Pet. 12), in arguing that a justiciable issue is presented. However, those cases are inapposite because they involve the right of

to obtain judicial review should they ever file a complaint concerning the lack of protective services that is rejected by the Commission. Until then, however, petitioners' concern remains merely speculative and presents no issue ripe for judicial determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MARK L. EVANS,
General Counsel,
Interstate Commerce Commission.

JUNE 1977.

affected parties to challenge agency orders promulgating new regulations. In the instant case, the Commission issued no new rules regarding protective services and simply discontinued its investigation after determining that protective services were "reasonably adequate" a finding that petitioners do not challenge.